RECORD NO. _____

IN THE
Supreme Court of the United States

TIMOTHY RICHARDSON,

Petitioner,

v.

EDWARD THOMAS, Warden, Central Prison,
Raleigh, North Carolina,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-3

TIMOTHY RICHARDSON,

Petitioner - Appellee,

v.

EDWARD THOMAS, Warden, Central Prison, Raleigh, North Carolina,

Respondent - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (5:08-hc-02163-BO)

Argued: January 30, 2019 Decided: July 12, 2019

Before MOTZ and KEENAN, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Vacated and remanded with instructions by published opinion. Senior Judge Traxler wrote the opinion, in which Judge Motz and Judge Keenan concurred.

ARGUED: Jonathan Porter Babb, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellant. Kenneth Justin Rose, KEN ROSE, Durham, North Carolina, for Appellee. **ON BRIEF:** Josh Stein, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF NORTH CAROLINA, Raleigh, North Carolina, for Appellant. Stanley F. Hammer, WYATT, EARLY, HARRIS & WHEELER, LLP, High Point, North Carolina, for Appellee.

TRAXLER, Senior Circuit Judge:

Timothy Richardson filed a motion under Federal Rule of Civil Procedure 60(b)(6), seeking to reopen the district court's final judgment dismissing his Eighth Amendment, intellectual disability claim on the merits under 28 U.S.C. § 2254(d). The motion was based upon the United States Supreme Court's subsequent decision in *Hall v. Florida*, 572 U.S. 701 (2014). The district court granted the motion, but certified this interlocutory appeal by the State under 28 U.S.C. § 1292(b). Because Richardson's motion is the functional equivalent of a § 2254 petition, we vacate the district court's order and remand with instructions to dismiss the motion.

I.

In 1995, a North Carolina jury convicted Richardson of kidnapping and murder. He was sentenced to death. His convictions and sentences were affirmed on direct appeal, *State v. Richardson*, 488 S.E.2d 148 (N.C. 1997), and the Supreme Court denied certiorari, *Richardson v. North Carolina*, 522 U.S. 1056 (1998).[1]

In 2002, Richardson filed a post-conviction motion for appropriate relief ("MAR") in North Carolina state court. He alleged that he suffered from an intellectual disability that rendered his capital sentence violative of the Eighth Amendment. *See Atkins v. Virginia*, 536 U.S. 304 (2002). To succeed on his claim, Richardson was required to demonstrate that he had (1) "*significantly subaverage general intellectual functioning,*"

[1] The underlying facts and procedural history of this case are fully set forth in our prior decisions in *Richardson v. Thomas*, 718 Fed. App'x 192 (4th Cir. 2018), and *Richardson v. Branker*, 668 F.3d 128 (4th Cir. 2012).

defined as an IQ "of 70 or below," and (2) "*significant limitations in adaptive functioning,*" defined as "[s]ignificant limitations in two or more of [ten] adaptive skill areas." N.C. Gen. Stat. § 15A-2005(a)(1), (2) (2001). "An intelligence quotient of 70 or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning," under the statute, but "it is not sufficient, without evidence of significant limitations in adaptive functioning and without evidence of manifestation before the age of 18, to establish that the defendant is mentally retarded." N.C. Gen. Stat. § 15A-2005(a)(2).

In 2005, the state MAR court held a full evidentiary hearing on Richardson's intellectual disability claim. The MAR court considered four IQ scores, but only two were admissible as qualifying scores—an IQ score of 73 in 1995, and an IQ score of 74 in 2004. The court also considered expert testimony regarding the effect the standard error of measurement ("SEM"), Flynn effect and practice effect may have had upon Richardson's IQ scores, as well as lay and expert testimony about his limitations in adaptive functioning. The state MAR court found that Richardson had failed to establish either of the requisite prongs and denied his claim on the merits.

In his petition for a writ of certiorari to the North Carolina Supreme Court, Richardson argued that the MAR court, in deciding the first prong of the statutory test, "employ[ed] an overly restrictive construction of § 15A-2005, one that is contrary to the Eighth Amendment as interpreted by the United States Supreme Court's decision in

Atkins v. Virginia." J.A. 420. Specifically, Richardson argued that the MAR court "fail[ed] to take into consideration the Flynn effect, the practice effect or the standard error of measurement," J.A. 432, and erred in "consider[ing] only the numerical value obtained on [the] two [qualifying] IQ tests," J.A. 434. With regard to the second prong of the statutory test, Richardson argued that the MAR court improperly assessed his adaptive functioning and rendered factual findings that were contrary to the evidence. The Supreme Court of North Carolina denied review. *See State v. Richardson*, 667 S.E.2d 272 (N.C. 2008).

Richardson then filed an application for federal habeas relief under 28 U.S.C. § 2254(d), challenging the reasonableness of the state court's adjudication of his intellectual disability claim. With regard to the first prong—the state court's assessment of Richardson's general intellectual functioning—Richardson again argued that the state court had "employ[ed] an overly restrictive construction of § 15A-2005, one that is contrary to the Eighth Amendment as interpreted by the United States Supreme Court in *Atkins v. Virginia."* J.A. 777. Richardson argued that the "state court appear[ed] to have given weight only to the numbers obtained on the [IQ] tests, rather than interpreting all of the data to arrive at [Richardson's] true IQ," J.A. 754, and failed to adjust the scores based upon "the Flynn effect, the practice effect, and the standard error of measurement," J.A. at 743. With regard to the second prong—the state court's determination that he had failed to prove significant limitations in two or more of the ten adaptive skill areas—

Richardson argued that the state court's findings were based on an unreasonable determination of the facts in light of the evidence presented.

The district court reviewed the evidence that Richardson presented to the state court, including the expert testimony on the effect of the SEM, Flynn effect and practice effect on IQ scores, and the lay and expert testimony regarding Richardson's adaptive skills. Of particular relevance to this appeal, the district court observed that Dr. Hazelrigg, the mental health expert for the State, had "found petitioner was impaired in some of the adaptive skills areas, but ultimately concluded [he] was not mentally retarded." *Richardson v. Branker*, 769 F. Supp. 2d 896, 926 (E.D.N.C. 2011).

Based upon this evidence, the district court held that the state court's determination that Richardson had failed to prove significant subaverage intellectual functioning was not an unreasonable application of the law in *Atkins* or an unreasonable determination of the facts in light of the evidence presented. In doing so, the district court considered all of the evidence—including the testimony regarding the SEM, the practice effect, and the Flynn effect on Richardson's IQ scores, and testimony regarding Richardson's adaptive skills and intellectual disability—and held that Richardson:

> has not shown the state court clearly erred or acted unreasonably under the circumstances so as to warrant this court substituting its judgment. While this court does not discount factors such as the standard error of measurement, Flynn effect, or practice effect in assessing I.Q. scores, there is no requirement under N.C. Gen. Stat. § 15A-2005 for a court to adjust a defendant's IQ scores *downward* for such factors. The state court heard all of the evidence, including testimony on each of these factors, and *was entitled to consider and weigh these factors in assessing whether petitioner carried his burden of showing an I.Q. of 70 or below*. Notably, in assessing petitioner's I.Q. score of 73, Dr. John Gorman . . . concluded petitioner was

> not mentally retarded, but was functioning at the borderline level of intellect. Similarly, Dr. Hazelrigg . . . concluded petitioner was not mentally retarded and is not now mentally retarded.

Id. at 927 (emphasis added). "Ultimately, in light of all of the evidence presented, including [the IQ test scores] and the expert opinions of Drs. Gorman and Hazelrigg that petitioner was not mentally retarded," the district court held that Richardson "cannot show the MAR court acted unreasonably in determining [Richardson] failed to show he had significantly subaverage general intellectual functioning." *Id.* And because Richardson was required to show both significantly subaverage general intellectual functioning *and* significant limitations in two or more of the ten adaptive skill areas, it was unnecessary for the court to address Richardson's separate challenges to the reasonableness of the state MAR court's factual findings that Richardson had failed to establish significant limitations in two or more adaptive skill areas. *See id.* at 927 & n.14.

We affirmed. *See Richardson v. Branker*, 668 F.3d 128 (4th Cir. 2012). Applying the deferential standard of review mandated by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we held that "the MAR court's denial of Richardson's motion on the basis that he is not mentally retarded was neither based on an unreasonable determination of the facts nor an unreasonable application of the Supreme Court's decision in *Atkins.*" *Id.* at 153.

Like the district court, we were "not persuaded by Richardson's . . . argument that the MAR court should have adjusted *downward* his IQ scores of 73 and 74 due to the 'Flynn effect' and the 'practice effect.'" *Id.* at 151 (emphasis added). Although noting that the MAR court held an evidentiary hearing and received evidence concerning these

factors, "the MAR court declined to adjust Richardson's I.Q. scores on the basis of those theories." *Id.* at 152. Thus, our doing so would have "require[d] us to engage in a de novo review of the MAR court's decision [and] make our own factual findings." *Id.* This, we held, "is precisely the result that is forbidden under AEDPA, which requires deference and respect for a state court's adjudication of a claim on the merits." *Id.* We also agreed "with the district court's observation that there is no *requirement* [under *Atkins* or North Carolina law] for a court to adjust a defendant's I.Q. scores downward for such factors." *Id.* (internal quotation marks omitted); *see also Green v. Johnson*, 515 F.3d 290, 300 n.2 (4th Cir. 2008) (observing that "neither *Atkins* nor Virginia law appear[ed] to require expressly that [the Flynn effect or the standard error of measurement] be accounted for in determining mental retardation status"). And because the MAR court had not unreasonably concluded that Richardson failed to establish the first prong of the test, we too saw no need to address Richardson's separate challenges to the reasonableness of the state court's factual findings on the second prong. The United States Supreme Court denied Richardson's petition for certiorari. *See Richardson v. Branker*, 568 U.S. 948 (2012).

II.

Several years later, the United States Supreme Court issued its decision in *Hall v. Florida*. In *Hall*, the state prisoner obtained direct review in the United States Supreme Court of the Florida supreme court's rejection of his intellectual disability claim under *Atkins*. *See Hall*, 572 U.S. at 707. Hall argued that the Florida supreme court had

interpreted Florida's statute too "rigid[ly]" to comply with *Atkins'* prohibition of the execution of the intellectually disabled, because it had imposed a bright-line IQ cut-off score of 70 that totally foreclosed "all further exploration of intellectual disability," including consideration of the SEM and evidence of adaptive functioning deficits. *Id.* at 704.

In *Atkins*, the Supreme Court had left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of the sentences." *Atkins*, 536 U.S. at 317 (internal quotation marks and alteration omitted). In *Hall*, however, the Supreme Court held that States did not "have complete autonomy to define intellectual disability as they wished," or else "the Court's decision in *Atkins* could become a nullity." *Hall*, 572 U.S. at 720. The Court held that Florida's application of its intellectual disability statute as imposing a bright-line, cut-off score was indeed too restrictive, under applicable clinical definitions of intellectual disability, to satisfy the Eighth Amendment.

Armed with *Hall*, Richardson returned to state court, arguing that *Hall* should be applied retroactively to his claim, and reasserting his prior claim that North Carolina, like Florida, had interpreted its intellectual disability statute too rigidly in 2005 when it first considered his claim. Richardson argued that North Carolina had also applied a "strict cutoff" IQ score of 70, J.A. 1142, and that it too had "failed to permit consideration of other evidence relied upon by experts in the field including the standard error of measurement, the practice effect, the Flynn effect, and clinically-appropriate assessment

measures of adaptive behavior." J.A. 1143. In other words, Richardson made essentially the same argument that he had previously made to the North Carolina Supreme Court, the district court, this court, and the United States Supreme Court.

The state MAR court denied Richardson's request that it revisit its prior denial of his claim, concluding that the claim was procedurally barred because it had already been raised and adjudicated on the merits in the previous state court proceedings, and that *Hall* was not retroactively applicable to cases on collateral review. *See* N.C. Gen. Stat. 15A-1419(a)(2).

In the alternative, the court held that *Hall* had no effect upon its prior adjudication of Richardson's intellectual disability claim. First, and unlike in Florida, "[t]he North Carolina Supreme Court has not interpreted North Carolina's statute to preclude consideration of the [SEM] or to limit the introduction of evidence if the threshold showing of an IQ score of 70 or below has not been met." J.A. 1234. Accordingly, the court held, North Carolina's statute could be and had been "interpreted consistently with *Atkins*." J.A. 1234.

Second, and unlike Hall, Richardson *had* been "allowed to present evidence of his alleged deficits in adaptive functioning in a full evidentiary hearing without restriction," as well as evidence "on the standard error of measurement," J.A. 1234, and the state court had "considered all of Richardson's IQ test scores, without limitation, as well as evidence of his alleged limitations in adaptive functioning." J.A. 1234-35.

> At his evidentiary hearing, Richardson was allowed to present evidence and argument on the standard error of measurement. The State's expert witness

> also testified regarding the standard error of measurement. Unlike in *Hall*, this Court did not restrict the evidence presented about the application of the standard error of measurement and has already considered that evidence.
>
> Richardson was also not precluded from presenting evidence of his alleged limitations in adaptive functioning. The State argued at the outset of the hearing that Richardson should have to show an IQ score of 70 or below before being granted an opportunity to present evidence at the hearing. After rejecting the State's argument to limit the presentation, this Court proceeded to conduct a full evidentiary hearing wherein Richardson was allowed to present evidence of alleged significant limitations in adaptive functioning,

J.A. 1235. Thus, the court held that *Hall* did not alter the court's prior determination that Richardson was not intellectually disabled and, by allowing Richardson to present evidence on the SEM and his adaptive functioning, it had, in effect, "already interpreted North Carolina's law consistently with *Hall.*" J.A. 1235.

Finally, the state court rejected Richardson's intellectual disability claim again on the merits, and even in light of his proffered new evidence. The court held that "Richardson has provided no evidence to support this Court finding him intellectually disabled." J.A. 1235. In particular, Dr. Hazelrigg's opinion that Richardson is not intellectually disabled "remains consistent" with his prior opinion, and "nothing from *Hall v. Florida*, or developments in the field of mental health has affected his conclusion that Richardson is not intellectually disabled." J.A. 1236 (internal quotation marks and alterations omitted).

The North Carolina Supreme Court denied review, *see State v. Richardson*, 782 S.E.2d 736 (N.C. 2016), as did the United States Supreme Court, *see Richardson v North Carolina*, 137 S. Ct. 337 (2016).

Having failed to succeed in his efforts to overturn his capital sentence before the state courts in light of the Supreme Court's decision in *Hall*, Richardson returned to federal court and asserted the identical claim. However, he did so in a motion to reopen the court's final judgment in his § 2254 proceedings, under Rule 60(b)(6) of the Federal Rules of Civil Procedure. The district court granted the motion and certified this interlocutory appeal. For the reasons that follow, we now vacate the district court's order and remand with instructions to dismiss the motion.

III.

A.

AEDPA strictly limits a federal court's authority to grant habeas relief under 28 U.S.C. § 2254 to a state prisoner based upon an alleged violation of his federal constitutional rights. Grounded in principles of comity, the federal courts "shall not" grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim" (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2).

State prisoners are also limited to one round of federal habeas review of their state court convictions, save in two narrow circumstances. "A claim presented in a second or successive habeas corpus application under [28 U.S.C. § 2254] that was presented in a

prior application *shall* be dismissed." 28 U.S.C. § 2244(b)(1) (emphasis added). "A claim presented in a second or successive habeas corpus application under [28 U.S.C. § 2254] that was *not* presented in a prior application shall [also] be dismissed unless" the prisoner can show (1) that "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (2) newly discovered facts that, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2) (emphasis added); *see also Gonzalez v. Crosby*, 545 U.S. 524, 529-30 (2005) (Under § 2244(b), "any claim that has already been adjudicated in a previous petition must be dismissed," and "any claim that has *not* already been adjudicated must be dismissed unless it relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence.").

Moreover, jurisdiction to consider the question of whether the prisoner has made a prima facie showing that he satisfies the requirements of § 2244(b)(2) rests exclusively with the federal courts of appeal. *See* 28 U.S.C. § 2244(b)(3). "[B]efore the district court may accept a successive petition for filing, the court of appeals must determine that it presents a claim not previously raised that is sufficient to meet § 2244(b)(2)'s new-rule or actual-innocence provisions." *Gonzalez*, 545 U.S. at 530; *see also United States v.*

Winestock, 340 F.3d 200, 205 (4th Cir. 2003). "In the absence of pre-filing authorization, the district court lacks jurisdiction to consider [the] application. . . ." *Id.* at 205.

Generally speaking, Federal Rule of Civil Procedure 60(b) allows a civil litigant "to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence." *Gonzalez*, 545 U.S. at 528. Rule 60(b)(6), the provision that Richardson relies upon, "permits reopening when the movant shows any reason justifying relief from the operation of the judgment other than the more specific circumstances set out in Rules 60(b)(1)-(5)." *Id.* at 529 (internal quotation marks and alteration omitted). However, the Rule 60(b)(6) motion "must be made within a reasonable time," Fed. R. Civ. P. 60(c)(1), and the movant must "show extraordinary circumstances justifying the reopening of a final judgment," *Gonzalez*, 545 U.S. at 535 (internal quotation marks and alteration omitted).

Due to § 2244(b)'s statutory prohibition against the filing of second or successive habeas petitions, however, the United States Supreme Court has "firmly reined in" the availability of Rule 60(b) to a prisoner who seeks to reopen a final judgment issued in his federal habeas proceedings. *Moses v. Joyner*, 815 F.3d 163, 168 (4th Cir. 2016). In *Gonzalez*, the Supreme Court considered the question of whether a habeas petitioner could ever invoke Rule 60(b) without running afoul of the statutory limitations on the filing of second and successive habeas petitions in § 2244. The Court held that Rule

60(b) had a "valid role to play in habeas cases," but it also made clear that this role is a narrow one. *Gonzalez*, 545 U.S. at 534.

The *Gonzalez* analysis of the interplay between § 2244(b) and Rule 60(b) is important, and it reflects the unquestionable primacy of § 2244(b). A habeas petitioner is precluded from utilizing Rule 60(b) to assert a federal habeas "claim" as that term is used in § 2244(b)—that is, "an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez*, 545 U.S. at 530. A motion that seeks to present a claim of constitutional error that was omitted from the prior habeas petition, a motion that seeks to present newly discovered evidence in support of a claim that was previously denied, or a motion that "contend[s] that a subsequent change in substantive law is a 'reason justifying relief,'" must be dismissed. *Id.* at 531 (quoting Fed. R. Civ. P. 60(b)(6)). "[S]uch a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly." *Id.* at 531.

Thus, "[u]sing Rule 60(b) to present new claims for relief from a state court's judgment of conviction—even claims couched in the language of a true Rule 60(b) motion—circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Id.* at 531 (citing 28 U.S.C. § 2244(b)(2)). "The same is true of a Rule 60(b)(2) motion presenting new evidence in support of a claim already litigated. . . ." *Id.* And, allowing such claims to proceed under "Rule 60(b) would impermissibly circumvent the requirement that a

successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar." *Id.* at 532 (citing 28 U.S.C. § 2244(b)(3)).

Applying this clear guidance, the determination of whether a Rule 60(b) motion presents a habeas claim is "relatively simple." *Id.* If the Rule 60(b) motion raises a new ground for relief from the prisoner's state court conviction, it must be dismissed. And if the motion "attacks the federal court's previous resolution of a claim *on the merits*," it must also be dismissed. *Id.*; *see also id.* at 532 n.4 (When the movant asserts "that there exist . . . grounds entitling [him] to habeas corpus relief under 28 U.S.C. § 2254(a) and (d)," or "asserts that a previous ruling regarding one of those grounds was in error," he is seeking to raise a habeas corpus claim in a Rule 60(b) motion.). The narrow role carved out in *Gonzalez* for Rule 60(b) motions in the habeas context, in contrast, allows a district court to reopen nonmerits-based denials or dismissals of a state prisoner's federal habeas petition or claim, which resulted in no federal court having considered the merits of the claim at all. The Rule 60(b) movant is not raising a new habeas corpus claim, or attacking the federal court's previous denial of the claim on the merits, when he "merely asserts that a previous ruling which *precluded* a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.* at 532 n.4.

Accordingly, when presented with a Rule 60(b) motion in a habeas proceeding, the district court's *first* inquiry must be to "decide whether [the] Rule 60(b) motion filed by [the] habeas petitioner is a 'habeas corpus application' as [§ 2244(b)] uses that term." *Id.*

at 530. "If so, the court must either dismiss the motion for lack of jurisdiction or transfer it to this court so that we may perform our gatekeeping function under § 2244(b)(3)." *Winestock*, 340 F.3d at 207.

B.

By its terms, Richardson's motion "present[ed] a single ground for relief from judgment: he has an intellectual disability that bars the State of North Carolina from executing him." J.A. 1108 (footnote omitted). Richardson asserted that the state court imposed "a bright line cutoff IQ score of 70 or below" when it originally adjudicated his claim, J.A. 1109, and that the state court had "preclud[ed] application of the standard error of measurement in determining whether [his] IQ scores of 73 and 74 satisfied the intellectual disability prong of the statute," J.A. 1108. This is the same claim (and essentially the identical argument) that he presented to the district court in 2011. Richardson's new argument was that the Supreme Court's decision in *Hall* "must be applied retroactively to [his] case," J.A. 1119 n.6, and that the "change in law wrought by *Hall*" was an extraordinary circumstance warranting Rule 60(b)(6) relief from the district court's 2011 final judgment denying his claim on the merits, J.A. 1122.

One can hardly imagine a second or successive habeas application that is so poorly disguised as a Rule 60(b)(6) motion. Richardson's motion was a clear attempt to circumvent AEDPA's restrictions on the filing of a second or successive federal habeas petition based upon a new rule of law, presenting his *Hall* claim to the district court instead of coming first to us. Indeed, when questioned by the district court about the

propriety of his Rule 60(b) motion in light of § 2244, Richardson's counsel advised the court that he did not come to the Fourth Circuit first because 28 U.S.C. § 2244(b)(1) precluded him from reasserting his intellectual disability claim in a second or successive habeas application. Presumably, Richardson's counsel also knew that, regardless of whether Richardson could ultimately succeed on a motion to file a second or successive application based upon a "new rule" in *Hall*, Richardson was statutorily *prohibited* from filing the claim in district court without obtaining prior authorization to do so from this court. 28 U.S.C. § 2244(b)(3). And, Richardson's counsel did not even argue that Rule 60(b) relief was available because there was a defect in the prior habeas proceedings that had precluded the district court from adjudicating the merits of his intellectual disability claim.

The district court also recognized that Richardson's Rule 60(b) motion "directly attack[ed] th[e] court's merits adjudication [of his intellectual disability claim] in light of *Hall*." J.A. 1616. *See Gonzalez*, 545 U.S. at 532 (A Rule 60(b) motion improperly states a habeas claim "if it attacks the federal court's previous resolution of a claim *on the merits*"). However, the district court did not dismiss the Rule 60(b) motion as an unauthorized, successive § 2254 petition, or transfer it to this court for a decision as to whether Richardson should be allowed to file the claim under § 2244(b). *See Winestock*, 340 F.3d at 207. Instead, the district court *first* considered whether the Supreme Court's decision in *Hall* should be retroactively applied to cases on collateral review and, after assuming that it should, held that the motion was timely filed and that *Hall* was an

extraordinary circumstance for purposes of Rule 60(b)(6). Only then did the district court turn to what should have been the *threshold* inquiry under *Gonzalez*—whether the Rule 60(b) motion attacked the district court's prior resolution of a habeas claim on the merits (or raised an entirely new claim), or merely asserted a procedural defect in the integrity of the original proceedings that had precluded an adjudication on the merits of the claim.

As noted above, this approach to Richardson's Rule 60(b) motion was incorrect, and it led to the district court's erroneous grant of Rule 60(b) relief. When presented with a Rule 60(b) motion to reopen the final judgment in a habeas proceeding, the district court's *first* inquiry is to "decide whether [the] Rule 60(b) motion filed by [the] habeas petitioner is a 'habeas corpus application' as [§ 2244(b)] uses that term." *Gonzalez*, 545 U.S. at 530; *see also Winestock*, 340 F.3d at 207. This makes sense, because until the district court determines whether the Rule 60(b) motion filed by the habeas petitioner is in actuality a disguised § 2244 motion, it cannot determine whether it has jurisdiction to move forward. Only if the district court determines that the motion does not seek an adjudication on the merits of a constitutional claim, or challenge "the federal court's previous resolution of a claim *on the merits*," may the district court proceed to exercise its discretion under Rule 60(b)(6) to decide whether the motion satisfies Rule 60(b)'s requirements of timeliness and extraordinary circumstances. *Gonzalez*, 545 U.S. at 532. The district court compounded this error by concluding that its failure to conduct an evidentiary hearing was a defect in the integrity of the prior proceedings. Even if the failure to conduct an evidentiary hearing on a prior habeas claim could ever be viewed as

a procedural defect, the purported "defect" would not allow the district court to circumvent § 2244(b) in order to readjudicate the merits of a previously-raised claim or to rely upon new Supreme Court precedent in doing so.

To conclude, Richardson's Rule 60(b)(6) motion plainly sought a readjudication of the *merits* of his intellectual disability claim, which he had presented in his prior § 2254 application, based upon the Supreme Court's decision in *Hall*. Because the motion circumvented the restrictions on second or successive habeas petitions set forth in § 2244(b), and this court's exclusive jurisdiction to decide whether such a petition can be filed in the district court, the district court was required to either dismiss the motion or transfer it to this court so that we could consider it under our gatekeeping function under 28 U.S.C. § 2244(b)(3). *See Winestock*, 340 F.3d at 207.

C.

On appeal, Richardson has raised an entirely new basis for granting Rule 60(b) relief. Richardson argues that the state court "clarified" North Carolina's intellectual disability statute in 2015 (when it ruled upon his *Hall* claim), and that this clarification revealed that the district court misinterpreted state law when it denied his intellectual disability claim in 2011. In other words, Richardson attempts to shoehorn this purported "error" in the district court's rejection of his claim on the merits in 2011 into a plausible argument (under *Gonzalez*) that the district court failed to *resolve* the merits of his intellectual disability claim on the first go round. Again, we disagree.

Richardson's new ground for Rule 60(b) relief, raised for the first time on appeal, cannot validate the district court's erroneous exercise of jurisdiction over the Rule 60(b) motion as presented. *Cf. Winestock*, 340 F.3d at 208 (holding that "it would be inappropriate for us to let the decision of the district court stand, because it was entered without jurisdiction"). Nor is it a legitimate, alternative ground for affirming the district court's grant of Rule 60(b) relief. It does not rely upon the same purported defect in the original habeas proceedings, the same clearly-established Supreme Court precedent, or the same change in substantive law that was relied upon by the district court.

Richardson's new ground for Rule 60(b)(6) relief also does not fall within *Gonzalez's* narrow exception to § 2244's limitations. In *Gonzalez*, the Supreme Court provided quite clear guidance for distinguishing between a true Rule 60(b) motion and a disguised § 2254 petition. The Court repeatedly focuses the threshold inquiry on whether the district court denied the habeas petitioner's constitutional claim *on the merits* under § 2254(d), or whether the district court's prior dismissal of the habeas claim was based upon a *procedural* ruling that *precluded* the court from reaching the merits of the constitutional claim under § 2254(d). This quite basic, and understandable, merits/nonmerits distinction permeates the *Gonzalez* opinion, and it does not support Richardson's argument that he can reopen the final judgment denying his federal habeas claim on the merits under § 2254(d), based upon a clarification of substantive law or a subsequently-discovered error. We need not go any further than the language of *Gonzalez* to be sure of that.

A Rule 60(b) motion that "contend[s] that a *subsequent change in substantive law* is a 'reason justifying relief' from the previous denial of a claim . . . , although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly." *Gonzalez*, 545 U.S. at 531 (emphasis added). This is because "[a] Rule 60(b) motion based on a purported change in the substantive law governing the claim could be used to circumvent § 2244(b)(2)(A)'s dictate that the only new law on which a successive petition may rely is a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* at 531-32 (internal quotation marks omitted).

A Rule 60(b) motion that asserts that there was an *error* in the district court's prior denial of a constitutional claim on the merits is also a successive habeas petition, and must be dismissed under § 2244(b)(1). *Id.* at 532. As the Supreme Court made clear:

> In most cases, determining whether a Rule 60(b) motion advances one or more "claims" will be relatively simple. A motion that seeks to add a new ground for relief . . . will of course qualify. A motion can also be said to bring a "claim" if it attacks the federal court's previous resolution of a claim *on the merits*, since alleging that the court *erred* in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief."

Id. (second emphasis added). When a movant asserts a ground for habeas corpus relief under 28 U.S.C. § 2254(a) and (d) or, as in this case, "asserts that a previous ruling regarding one of those grounds was in *error*, he is making a habeas corpus claim." *Id.* at 532 n.4 (emphasis added).

Richardson's new ground for Rule 60(b) relief asserts the same claim that he asserted in his § 2254 petition—that his intellectual disability prohibits his execution under the Eighth Amendment. The district court (and this court) denied that claim *on the merits* under § 2254(d). Thus, Richardson plainly seeks a readjudication of the merits of his claim—based upon a purported change in substantive state law that revealed an error in the district court's prior adjudication of the merits of his claim. In the end, his new claim is still "effectively indistinguishable from alleging that [he] is, under the substantive provisions of the statutes, entitled to habeas relief," *id.* at 532, and he "ask[s] for a second chance to have the merits [of his claim] determined favorably" based upon a subsequently-issued decision. *Id.* at 532-33 n.5.

Richardson's argument that Rule 60(b) relief is available because the district court's "misinterpretation" of state law resulted in the court never reaching the second prong of the intellectual disability test leads to no different result. It is hardly unusual for a federal court to deny a federal habeas claim on the merits under § 2254(d), based upon the petitioner's failure to demonstrate the unreasonableness of the state court's decision on one of two factors necessary to establish the constitutional claim. The most common example, perhaps, would involve Sixth Amendment ineffective-assistance-of-counsel claims. *See Strickland v. Washington*, 466 U.S. 668 (1984). A federal court's denial of the claim based upon a single factor may turn out to be *erroneous*, at the time or in light of subsequently-issued court decisions. But the federal court's denial of the habeas claim is no less an adjudication of the claim *on the merits* for purposes of § 2254(d) and §

2244(b). It does not affect the finality of the judgment denying the claim on the merits, or change the fact that the habeas petitioner, if he subsequently tries to remedy an error via a Rule 60(b) motion, is still asking for a "second chance to have the merits determined favorably." *Gonzalez*, 545 U.S. at 532 n.5. If the district court erred in its interpretation of state law at all in 2011, it was an error that was required to be raised and addressed on direct appeal from the district court's judgment. It is not a means to circumvent the clear prohibition on the filing of a successive petition in § 2244(d).

Richardson may have been entitled to return to state court and ask it to revisit its prior adjudication of his intellectual disability claim based upon *Hall*, and to ask the United States Supreme Court to overturn the 2015 state court decision denying him relief under *Hall*. But he is not entitled to circumvent the statutory limitations on second or successive habeas petitions under § 2244(b), and reopen the federal court's final judgment denying his habeas claim on the merits under Rule 60(b), based upon *Hall* or the 2015 state court decision.[2]

[2] We also see no error in the federal courts' original adjudication of Richardson's intellectual disability claim. Neither the district court nor this court were tasked with reviewing Richardson's intellectual disability claim *de novo* under state law or federal law. We were tasked first with deciding whether the state court's determination that Richardson failed to prove significantly subaverage general intellectual functioning, based upon the clearly established law in *Atkins* and the evidence presented, was reasonable. And because that decision was reasonable, in light of all of the evidence, there was no need to address Richardson's *separate* challenges to the reasonableness of the state court's factual findings that Richardson had failed to prove significant limitations in two or more of ten adaptive skill areas as required by the second prong. Neither *Hall*, nor the state MAR court's rejection of Richardson's post-judgment *Hall* claim, changes the correctness of the district court's and this court's resolution of (Continued)

In the end, "[n]o matter how much lipstick [Richardson] applies to this particular pig, it is still a pig—that is to say, a [claim] for habeas" relief, *Day v. Trump*, 860 F.3d 686, 690 (D.C. Cir. 2017), that has already been adjudicated and denied on the merits by the federal courts in the habeas review proceedings. Despite Richardson's protestations to the contrary, his Rule 60(b) motion filed in district court asserted that his previous claim of intellectual disability was wrongly decided on the merits based upon *Hall*, and his new ground for Rule 60(b) relief asserts that his previous claim of intellectual disability was wrongly decided on the merits based upon the state court's 2015 decision. As *Gonzalez* makes, clear, these are habeas claims not properly brought in a Rule 60(b) motion. If Richardson is to have a second chance to litigate the merits of his intellectual disability claim, he must get it under § 2244(b).[3]

IV.

For the foregoing reasons, we vacate the district court's order granting relief under Rule 60(b) and remand the case with instructions to dismiss the motion.

VACATED AND REMANDED WITH INSTRUCTIONS

Richardson's intellectual disability claim under *Atkins*. *Cf. Shoop v. Hill*, 139 S. Ct. 504, 509 (2019) (reversing and remanding the lower court's grant of habeas relief on petitioner's intellectual disability claim for reconsideration "based strictly on legal rules that were clearly established in the decisions of th[e] Court at the relevant time.").

[3] During the pendency of the State's appeal, Richardson filed a motion in this court seeking authorization to file a successive habeas petition under 28 U.S.C. § 2244(b). *See In re Richardson*, No. 17-7 (4th Cir. docketed Oct. 5, 2017). That motion remains under consideration and will be decided in a separate opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:08-HC-2163-BO

TIMOTHY RICHARDSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
CARLTON JOYNER[1],	)	
	)	
Respondent.	)	

This matter is before the court upon petitioner's motion to set aside judgment [DE-61]. For the following reasons, petitioner's motion is ALLOWED. However, the court will STAY the proceedings in this matter to permit respondent to appeal this ruling to the Fourth Circuit.

I. Statement of the Facts

The North Carolina Supreme Court summarized the facts of the case as follows:

> On 6 October 1993 twenty-three-year-old Tracy Marie Rich (victim) went to work at the L & L Food Store in Castalia, North Carolina. Linda Rich, the victim's mother, spoke with her daughter at approximately 10:00 p.m. According to the computer records of the alarm system installed at the store, the victim closed the store at 11:41 p.m. Ordinarily, the victim would arrive home from work around 11:40 or 11:50 p.m. When her daughter did not return home at her usual time, Linda Rich became worried and drove to the store. Ms. Rich did not find her daughter at the store and did not see anything unusual at the scene; Ms. Rich returned home.
>
> The store's front-door motion detector and alarm "tripped" at 1:50 a.m. on 7 October. Lieutenant Leonard Brantley of the Nash County Sheriff's Department was called to

[1] When Petitioner filed his § 2254 petition, he named Gerald Branker, then warden of Central Prison, as respondent. Since that time, Mr. Carlton Joyner has succeeded Mr. Branker and others as warden of Central Prison. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Clerk of Court is directed to substitute Carlton Joyner as the respondent in this matter.

the store. Brantley checked the rear of the store and found it to be secure. Another officer informed Brantley that the front door was also secure. Brantley noticed a red car parked behind the store. The car was unoccupied, and no heat was coming from the hood. Brantley subsequently learned that the car was registered to Terry Richardson, defendant's wife. Neither Brantley nor other officers at the store observed anything out of order, and they left the scene. The front-door alarm did not indicate that the front door was opened again until the next morning when the store was opened for business.

Rose Hankerson, the assistant store manager, arrived at the store on 7 October at approximately 5:55 a.m. and unlocked the store, which was equipped with a two-way lock. When Hankerson reached to put her key in to relock the door from the inside, she noticed that there was a key already in the door. Hankerson walked to the back of the store to turn off the alarm system and saw what she recognized as the victim's key ring lying on the floor. When Hankerson turned the store lights on, she noticed that part of the store's ceiling had been knocked out and was lying on the floor. At this time Hankerson called the Sheriff's Department.

Lieutenant Brantley returned to the store shortly after 6:00 a.m. Pieces of plasterboard from the ceiling were on the floor inside the store. There were also indications that someone had attempted to move the store safe. A ventilator opening on the rear of the building had also been removed. Brantley observed that the red car was gone.

The victim's body was found wedged under her car on a dirt road not far from the store. The victim's tennis shoe and her eyeglasses were found in the road near the car. The eyeglasses appeared to have been run over by a vehicle.

Because defendant's wife's car had been seen at the store the previous night, defendant became a suspect in the murder investigation. Officers went to defendant's home and located defendant hiding in the attic. Defendant was arrested and gave several statements to law enforcement officers.

In defendant's first statement he denied any knowledge of the murder. Defendant told officers that he went to work on the morning of the sixth and then went home for the rest of the night. Defendant stated that he hid from the officers because he thought they were after him for writing a bad check.

When confronted with inconsistencies in his original statement, defendant gave a second statement in which he implicated Kevin Hedgepeth. Defendant stated that he gave Hedgepeth a ride to the store so he could get some money. According to defendant, Hedgepeth grabbed the victim when she came out of the store, put her in the passenger side of her car, and motioned for defendant to follow in his car.

Defendant followed Hedgepeth and the victim to a dirt road. Defendant stated that he saw the victim run by his car and that he witnessed Hedgepeth run over the victim. Defendant told officers that the victim attempted to crawl out of the road and that Hedgepeth backed up and ran over her again.

Defendant stated that Hedgepeth came over to his car and got in the passenger side. Hedgepeth told defendant that he had some money and wanted "to go to get a rock" (crack cocaine). Defendant stated that after purchasing "a rock," Hedgepeth told him that he wanted to go back to the store because he had the keys.

Defendant stated that he and Hedgepeth returned to the store, and Hedgepeth went inside while defendant parked the car. Defendant then also went into the store. When officers arrived at the store in response to the alarm, Hedgepeth hid inside the store and defendant left through the roof. After the officers left the area, Hedgepeth also left the store through the roof. Defendant stated that he gave Hedgepeth a ride home and that Hedgepeth gave him thirty dollars. Defendant stated that he knew Hedgepeth did not have any money before the victim was murdered.

After defendant gave his second statement, the police located Kevin Hedgepeth. Hedgepeth told officers that on 6 October, he got home around 11:00 p.m. Hedgepeth stated that defendant arrived at his house at approximately 2:00 a.m. and asked for a ride to Castalia. Defendant told Hedgepeth he was out of gas and needed a ride to his car. Hedgepeth and his uncle dropped defendant off near the store but did not see defendant's car. The police cleared and released Hedgepeth.

In a third statement defendant told officers that he and Hedgepeth were dropped off together by Hedgepeth's uncle at the store. Defendant maintained that Hedgepeth was also present during the murder.

At trial State Bureau of Investigation Special Agent Joyce Petzka, an expert in comparing footprint and tire-track impressions, opined that a shoe impression left on a piece of plasterboard collected from the store was made by defendant's right shoe. Special Agent Jonathon Macy, an expert in the field of forensic fiber identification, testified that fibers taken from the T-shirt defendant was wearing when he was arrested were consistent with fibers found on the victim's shirt. Agent Macy also testified that polyester fibers taken from the plasterboard at the roof entry of the store were consistent with fibers that made up the yarn of defendant's T-shirt.

Dr. Robert E. Zipf testified that the victim died as a result of multiple blunt-force injuries and compression injuries to her body, head, and chest as a result of being hit by and run over with a vehicle.

Defendant presented evidence during the sentencing proceeding that he had been

married to Terry Richardson for ten years and had a two-year-old daughter. Mrs. Richardson testified that defendant had a good relationship with his daughter. Mrs. Richardson also testified that defendant had a problem with drugs.

Defendant presented the testimony of two mental health experts. Dr. Billy Royal testified that based upon his evaluation and the results of defendant's testing, defendant suffered from crack-cocaine abuse and dependency, cocaine intoxication which was in remission, marijuana dependency which was in remission, alcohol abuse and alcohol intoxication in remission, borderline mental retardation, mild neurocognitive disorder, and personality disorder. Dr. Royal testified that he felt defendant's retardation was caused by acute lead intoxication at the age of three. Dr. Royal also testified that the lead accounted for defendant's neurocognitive disorder. Dr. Royal testified that in his opinion defendant's capacity to appreciate the criminality of his conduct was impaired at the time of the crime and that on the date of the murder defendant suffered from an emotional illness that prevented him from appreciating the criminality of the present charge.

Dr. John Gorman testified that defendant had significant difficulty with anything based upon language functioning and that his "overall functioning would be comparable to that of an average eleven-and-a-half [or] twelve-year-old." Dr. Gorman testified that defendant has "fairly significant intellectual limitations" which are aggravated by drug use, making "his judgment and other functionings even less effective than they normally are." Dr. Gorman also opined that defendant "has significant limitations as far as being able to anticipate consequences when he's straight or when he's in regular state of mind. And when he has been ingesting various drugs, I'm sure he has even less capacity to anticipate the consequences of his acts."

The prosecution and defense stipulated that defendant's criminal record consisted of a misdemeanor worthless-check charge in 1989, a misdemeanor larceny in 1991, and several traffic violations.

Richardson, 346 N.C. at 526-29, 488 S.E.2d at 151-53.

II. Statement of the Case

On May 25, 1995, after a trial by jury, petitioner was found guilty of one count of first-degree murder and one count of first-degree kidnaping. Pet. [DE-1], p. 5. Petitioner was sentenced to death. Id. Petitioner appealed, and the North Carolina Supreme Court affirmed his convictions and sentence on July 24, 1997. State v. Richardson, 346 N.C. 520, 488 S.E.2d 148 (1997). The United States

Supreme Court denied certiorari on January 12, 1998. Richardson v. North Carolina, 522 U.S. 1056 (1998).

Petitioner filed a motion for appropriate relief ("MAR") in the Superior Court of Nash County on March 18, 1999. Pet. [DE-1], p. 6. On January 31, 2002, petitioner amended his MAR to allege that he was not eligible for the death penalty due to his intellectual disability[2]. Id. With the exception of his claim that he could not be executed because he has an intellectual disability, all of the claims in petitioner's MAR were denied on April 9, 2002. Id. at 6-7. An evidentiary hearing was held on petitioner's intellectual disability claim on June 17, 2005. Id. at 7. On July 29, 2005, the state court concluded that petitioner did not have an intellectual disability as set out in Section 15A-2005[3] of the North Carolina General Statutes. Id. The North Carolina Supreme Court denied certiorari on August 26, 2008. State v. Richardson, 667 S.E.2d 272 (N.C. 2008).

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this court on November 7, 2008, in which he alleged that: (1) the State withheld material exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), and presented false evidence in violation of Napue v. Illinois, 360 U.S. 264 (1959); (2) he received ineffective assistance of trial counsel because counsel did not move to suppress petitioner's statements to police; (3) he received ineffective

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[2] The term "mentally retarded", or some variation, was used throughout petitioner's state and federal habeas proceedings. In Hall v. Florida, 134 S.Ct. 1986 (2014), the Supreme Court used the term "intellectual disability." To be consistent with the Supreme Court and current medical terminology, the court will use the term "intellectual disability" except when quoting prior proceedings.

[3] At the time of petitioner's sentencing, the state of North Carolina defined "mental retardation" as "significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18." N.C.G.S. § 15A-2005 (revised September 23, 2015). The state continues to use the same definition for the term intellectual disability. Id.

assistance of appellate counsel because counsel failed to argue on direct appeal that petitioner was prejudiced when the trial court failed to submit a statutory mitigating circumstance relating to petitioner's mental age; and (4) he has a intellectual disability and cannot be sentenced to death following the decision in Atkins v. Virginia, 536 U.S. 304 (2002). Pet. [DE-1], pp. 2-3.

Respondent filed a motion for summary judgment on January 28, 2009 [DE-19]. On January 6, 2011, this court entered an order which granted in part and denied in part respondent's motion for summary judgment. Specifically, the court granted respondent's motion for summary judgment with regard to petitioner's first, second, and fourth claims. Richardson v. Branker, 769 F. Supp. 2d 896, 928 (E.D.N.C. 2011), aff'd in part, rev'd in part, 668 F.3d 128 (4th Cir. 2012). With regard to petitioner's third claim, the court determined that "the evidence clearly shows appellate counsel acted objectively unreasonable in not raising a claim about the court's failure to instruct on the [the mitigating factor of petitioner's mental age] at trial and there is a reasonable probability petitioner would have prevailed on appeal had the claim been raised." Id. at 924. Therefore, respondent's motion for summary judgment was denied with regard to petitioner's third claim. Id. The court stated that it would issue a writ of habeas corpus vacating petitioner's death sentence and directing the State of North Carolina to sentence petitioner to life imprisonment unless new sentencing proceedings were initiated. Id. at 928. The court did not conduct a hearing prior to reaching this decision.

Respondent appealed, and on February 6, 2012, the Fourth Circuit reversed that portion of the court's judgment denying respondent summary judgment and granting the writ, and remanded "with directions that Richardson's federal habeas petition be dismissed." Richardson v. Branker, 668 F.3d 128, 153 (4th Cir. 2012). In reaching this determination, the Fourth Circuit stated:

Upon our review, we hold that the district court's decision granting Richardson's

> petition runs contrary to the deference that federal courts are required to afford state court decisions adjudicating the merits of habeas corpus claims . . .
>
> Richardson's defense counsel did not ask for, and the trial judge did not submit, the statutory mitigating factor of "[t]he age of the defendant at the time of the crime," N.C.G.S. § 15A–2000(f)(7) (the (f)(7) mitigation instruction) . . .
>
> Richardson's argument of ineffective assistance of appellate counsel was based on his appellate counsel's failure to argue that the trial court should have submitted the (f)(7) mitigation instruction to the jury. In support of this argument, Richardson submitted the affidavit of his appellate counsel, who averred that he "was aware that [Richardson's] mental age was that of [sic] eleven and one-half or twelve years old and that his I.Q. was 73," but that "[t]he law regarding this mitigating factor [was] not clarified until after [Richardson's] trial" . . .
>
> We disagree with the district court's holding for several reasons. First, the district court erred in not affording any deference to the MAR court's contrary conclusion. When a claim of ineffective assistance of counsel raised in a habeas corpus petition involves an issue unique to state law, such as the availability of the (f)(7) mitigation instruction at issue here, a federal court should be especially deferential to a state post-conviction court's interpretation of its own state's law . . . Second, when viewed under the applicable AEDPA standard, it is manifest that Richardson failed to establish that the MAR court's decision was "so lacking in justification that [it] was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." See Harrington, 131 S.Ct. at 786–87. Moreover, we conclude that the law regarding the circumstances in which a North Carolina trial court must submit the (f)(7) mitigation instruction to the jury was not settled at the time of Richardson's appeal.

Richardson, 668 F.3d at 132-134, 141-142 (4th Cir. 2012) (alterations in original).

On March 27, 2012, this court entered an order granting respondent's motion for summary judgment and dismissing petitioner's habeas petition [DE-59]. The Supreme Court decided Hall v. Florida, 134 S.Ct. 1986 (2014) on May 27, 2014, in which it found unconstitutional a Florida law which defined intellectual disability to require an IQ test score of 70 or less. On January 20, 2015, petitioner filed a second MAR in the Superior Court of Nash County, arguing that he was not eligible for the death penalty in light of Hall. Pet'r. Ex. [DE-61-1], pp. 2-33. Petitioner's second MAR was

denied on June 15, 2015. Id. at 106-114. The North Carolina Supreme Court denied certiorari on March 21, 2016. State v. Richardson, 2016 WL 1103719 (N.C. 2016).

Petitioner filed the instant motion on April 4, 2016, in which he moves this court for relief from judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure [DE-61]. Respondent has responded to the instant motion [DE-63], and petitioner has filed a reply [DE-64]. The court held a hearing on petitioner's Rule 60(b) motion on March 15, 2017. Accordingly, the matter is now ripe for adjudication.

III. Discussion

Rule 60(b) states:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

F.R.Civ.P. 60(b).

Under Rule 60(b), a movant first must demonstrate that the movant acted promptly, that the movant has a meritorious claim or defense, and that the opposing party will not suffer prejudice by

having the judgment set aside. See Nat'l Credit Union Admin. Bd. v. Gray, 1 F.3d 262, 264 (4th Cir. 1993); Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 811 (4th Cir. 1988) (per curiam). If those three threshold conditions are met, the court then must determine whether the movant has satisfied "one of the six enumerated grounds for relief under Rule 60(b)." Nat'l Credit Union Admin. Bd., 1 F.3d at 266.

Before addressing whether petitioner qualifies for Rule 60(b) relief, the court first addresses respondent's arguement that Hall should not be considered retroactive to cases on collateral review. The Fourth Circuit has assumed without deciding that Hall applies retroactively. Prieto v. Zook, 791 F.3d 465, 470 (4th Cir.), cert. denied sub nom. Prieto v. David Zook, 136 S. Ct. 28, 192 L. Ed. 2d 999 (2015). The Sixth, Seventh, and Ninth Circuits have also applied Hall retroactively without explicitly addressing the issue of retroactivity. Smith v. Ryan, 813 F.3d 1175, 1178 (9th Cir. 2016) (applying Hall to 1982 conviction); Williams v. Mitchell, 792 F.3d 606, 611 (6th Cir. 2015) (applying Hall to 1989 conviction); Webster v. Daniels, 784 F.3d 1123, 1146 (7th Cir. 2015) (applying Hall to 1995 conviction). However, the Eighth and Eleventh Circuits have concluded that Hall does not apply retroactively to cases on collateral review. See Goodwin v. Steele, 814 F.3d 901, 903–04 (8th Cir. 2014); In re Henry, 757 F.3d 1151, 1159–61 (11th Cir.2014).

At the state level, Florida, Kentucky, and Alabama have applied Hall retroactively. Oats v. State, 181 So.3d 457 (Fla. 2015); White v. Commonwealth, 500 S.W.3d 208, 215 (Ky. 2016) ("Hall must be retroactively applied. In so holding, we are in the company of our sister state Florida which, of course was the state in which the underlying issue in Hall first arose."); Reeves v. State, No. CR-13-1504, 2016 WL 3247447, at *9 n. 7 (Ala. Crim. App. June 10, 2016) ("We disagree with the Eleventh Circuit's characterization of Hall as a new rule of constitutional law. We view Hall, not as

a new rule of constitutional law, but simply as an application of existing law, i.e., Atkins, to a specific set of facts.); Carr v. State, 196 So. 3d 926, 943 (Miss. 2016) (applying Hall to 1995 conviction). Tennessee determined that Hall does not apply retroactively, and a petition for certiorari in that case was recently denied by the Supreme Court. Payne v. State, 493 S.W.3d 478, 491 (Tenn. 2016) ("We decline to hold that Hall applies retroactively"), cert. denied, No. 16-395, 2017 WL 1040868 (U.S. Mar. 20, 2017). In this posture, the undersigned follows the Fourth Circuit's assumption that Hall applies retroactively.

Having determined that Hall applies retroactively, the court also finds petitioner has met the threshold requirements of Rule 60(b). First, as noted above, Hall was decided on May 27, 2014. After securing new supporting affidavits and other documentary evidence, petitioner filed a successive MAR on January 20, 2015. Pet'r. Mem. [DE-61], p. 9; Pet'r. Mem. [DE-64], p. 2. The instant motion was filed soon after his successive MAR was denied. Pet'r. Mem. [DE-61], p. 5. Thus, petitioner has acted promptly. Likewise, for reasons discussed more fully below, petitioner has a potentially meritorious claim that he is no longer eligible for the death penalty in light of Hall. Finally, while the court recognizes the state's interests in the finality of its judgments, the interest carries little force when weighed against the possibility of unconstitutionally imposing the death penalty. See Buck v. Davis, 137 S. Ct. 759, 779 (2017). Accordingly, the court finds that respondent will not be prejudiced if the judgment is set aside.

Next, petitioner argues that he should be granted relief from judgment pursuant to Rule 60(b)(6). Mot. [DE-61], pp. 1-2. Relief under Rule 60(b)(6) is available only in "extraordinary circumstances." In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, "the risk of injustice to

the parties" and "the risk of undermining the public's confidence in the judicial process." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863-864 (1988).

Here, petitioner argues that extraordinary circumstances exist because he is no longer eligible for the death penalty in light of Hall. In Hall, the Supreme Court held that a state may not mandate a "bright line" intelligence quotient of 70 or below in determining whether he or she qualifies as intellectually disabled and thus constitutionally ineligible for the death penalty. Specifically, the court examined a Florida law which mandated that "if . . .a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed." Hall, 134 S. Ct. at 1990. This law was determined to be unconstitutionally "rigid" because "by failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning." Id. at 1990, 2001. Instead, the law requires that a defendant facing the death penalty must "have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." Id. at 2001. The court also noted that, due to the inherent imprecision in IQ testing, a trial court considering an IQ score must also take into account the test's standard error of measurement ("SEM")[4]. Id. at 1995. In so holding, the Supreme Court stated in dicta that North Carolina has a statute "which could be interpreted to provide a bright-line cutoff leading to the same result that Florida mandates in its cases." Id. at 1996.[5]

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[4] SEM reflects the fact "that IQ test scores should be read not as a single fixed number but as a range." Hall, 134 S. Ct. at 1995. "A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself." Id.

[5] At the time petitioner was sentenced, N.C.G.S. § 15A-2005 stated that "[a]n intelligence quotient of 70 or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of

During the MAR court hearing to determine whether petitioner was intellectually disabled, petitioner presented evidence highlighting his alleged deficits in adaptive functioning. For example, petitioner presented evidence which demonstrated that his mother drank daily cases of beer during her pregnancy, he was hospitalized at age three-and-a-half for severe lead poisoning, and experienced substance abuse beginning when he was eleven or twelve years old. MAR Hrg. Tr. [DE-5], pp. 15-18. Based on the negative effects these of events on petitioner's intellectual development through childhood, Dr. Greg Ollie concluded that petitioner was mildly intellectually disabled, and had been for his entire life. Id. [DE-5-5], p. 36. Furthermore, the MAR court considered IQ scores of 73 and 74 presented by the state, and rejected an IQ score of 67 presented by petitioner because it was not administered by a psychologist.[6] Pet'r Ex. [DE-3-5], p. 2. The MAR court order finding that petitioner is not intellectually disabled makes no specific mention of the SEM of any of these IQ scores. Pet'r. Ex. [DE-3-5]. In turn, this court found no error in the MAR court's determination in either its January 6, 2011 or March 27, 2012 orders. This court held no hearing before reaching that conclusion. Moreover, in reaching that conclusion, this court specifically stated "[w]hile this court

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significantly subaverage general intellectual functioning; however, it is not sufficient, without evidence of significant limitations in adaptive functioning and without evidence of manifestation before the age of 18, to establish that the defendant is mentally retarded" N.C.G.S. § 15A-2005(a)(2) (revised September 23, 2015). On September 23, 2015, the following language was added to that statute "[a]n intelligence quotient of 70, as described in this subdivision, is approximate and a higher score resulting from the application of the standard error of measurement to an intelligence quotient of 70 shall not preclude the defendant from being able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits. Accepted clinical standards for diagnosing significant limitations in intellectual functioning and adaptive behavior shall be applied in the determination of intellectual disability." Id.; see also DISTRICT COURTS–CRIMES AND OFFENSES–JUDICIAL EFFICIENCY, 2015 North Carolina Laws S.L. 2015-247 (H.B. 173).

[6] However, this IQ test was administered by a psychometrist working under the supervision of a licensed psychologist. MAR Hrg. Tr. [DE-5-2], pp. 19-21.

does not discount factors such as the standard error of measurement . . . in assessing I.Q. scores, there is no requirement . . . for a court to adjust a defendant's I.Q. scores downward for [this] factor[ ]."[7] Richardson, 769 F. Supp. 2d at 927. That statement is no longer correct in light of Hall.

In sum, petitioner contends that extraordinary circumstances exist because evidence of his deficits in adaptive functioning has been improperly rejected, and both the MAR court and this court essentially adopted a bright-line rule in determining whether petitioner was eligible for the death penalty. The Supreme Court recently decided a case involving a Rule 60(b)(6) motion filed by a inmate facing the death penalty, Buck v. Davis, 137 S. Ct. 759 (2017). In Buck, the Supreme Court determined that enforcing a capital sentence on a flawed basis constitutes an extraordinary circumstance. Buck, 137 S. Ct. at 779. Likewise, the state's interest in preserving the finality of judgments deserves little weight in such circumstances. Id. Here, as in Buck, petitioner may have been sentenced to death on a flawed basis. As noted above, it is unclear whether the MAR court gave appropriate weight to the evidence of petitioner's deficits in adaptive functioning or to the SEM of his IQ test scores. Likewise, the undersigned notes that the federal habeas proceedings in this case were arguably defective because the court did not conduct a hearing to examine those issues. Accordingly, the court finds that petitioner has demonstrated extraordinary circumstances, and petitioner's motion to set aside judgment [DE-61] is ALLOWED.

However, respondent asserts that petitioner's motion to set aside judgment should be construed as a successive § 2254 petition, and thus requires authorization from the Fourth Circuit before proceeding further. The Antiterrorism and Effective Death Penalty Act bars a claim presented

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[7] The Fourth Circuit affirmed this court with regard to that finding. Richardson, 668 F.3d at 152.

in a second or successive habeas corpus application under § 2254 that was not presented in a prior application unless:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B) (I) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

Before a second or successive application for habeas relief may be filed in the district court, an applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3)(A); see In re Williams, 364 F.3d 235, 238 (4th Cir. 2004) ("The initial determination of whether a claim satisfies [the requirements set forth in § 2244(b)(2)] must be made by a court of appeals.") (citation omitted). Petitioner has not received authorization to file a second or successive action from the Fourth Circuit.

"In the context of a Rule 60(b) motion in a § 2254 case, the United States Supreme Court has held that if a Rule 60(b) claim directly attacks a prisoner's conviction or sentence (whether through advancing new arguments/claims or seeking to re-cast prior arguments/claims), such a motion 'is in substance a successive habeas petition' and it 'should be treated accordingly.'" Bay v. Clarke, No. 2:15CV64, 2017 WL 253971, at *3 (E.D. Va. Jan. 20, 2017) (quoting Gonzalez v. Crosby, 545 U.S.

524, 530-31 (2005)). A Rule 60(b) motion containing such claims "in effect asks for a second chance to have the merits determined favorably" and must therefore be dismissed for lack of jurisdiction. Bay, 2017 WL 253971, at *3 (quoting Gonzales, 545 U.S. at 532 n. 5). This includes situations where a subsequent change in substantive law is cast as a "reason justifying relief" pursuant to Rule 60(b)(6). Gonzalez, 545 U.S. at 531. Likewise, the Fourth Circuit has held that "district courts must treat Rule 60(b) motions as successive collateral review applications when failing to do so would allow the applicant to evade the bar against relitigation of claims presented in a prior application or the bar against litigation of claims not presented in a prior application." United States v. Winestock, 340 F.3d 200, 206 (4th Cir. 2003). "Although there is 'no infallible test' for determining when a Rule 60(b) motion should be treated as a successive application, 'relatively straightforward guide is that a motion directly attacking the prisoner's conviction or sentence will usually amount to a successive application, while a motion seeking a remedy for some defect in the collateral review process will generally be deemed a proper motion to reconsider.'" United States v. Gonzalez, 570 F. App'x 330, 335 (4th Cir. 2014) (quoting Winestock, 340 F.3d at 207). "A 'true' Rule 60(b) motion thus typically 'asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.'" Bay, 2017 WL 253971, at *3 (quoting Gonzales, 545 U.S. at 532 n. 4).

Here, this court did not conduct a hearing before it rejected petitioner's argument that he was intellectually disabled. "[I]n an unpublished pre-Gonzalez per curium opinion containing limited analysis, the Fourth Circuit has held that a challenge to the district court's failure to conduct an evidentiary hearing in a habeas case 'constituted a true Rule 60(b) motion' rather than an improper successive § 2254 motion." Bay, 2017 WL 253971, at *6 (quoting Rowe v. Dir., Dep't of Corr., 111

Fed. Appx. 150, 151 (4th Cir. 2004)). Accordingly, due to this court's failure to conduct an evidentiary hearing, the undersigned finds that a defect exists in the integrity of the federal habeas petition, and petitioner may proceed via a Rule 60 motion.

However, petitioner's Rule 60(b) motion does not mention this court's failure to conduct a hearing, but rather directly attacks this court's merits adjudication in light of Hall. Thus, the question of whether Rule 60(b) is the appropriate vehicle for petitioner's arguments is a close one. In this posture, the undersigned will STAY these proceedings to permit respondent to appeal. The court advises petitioner that, when these proceedings resume, he will be afforded an opportunity to elect between deleting any improper claims or having the entire motion treated as a successive application if appropriate. See Formica v. Superintendent of the Cent. Virginia Reg'l Jail, 642 F. Appx. 241, 243 (4th Cir. 2016) (holding that when the applicant files a mixed Rule 60(b)/§ 2254 petition the district court should afford the applicant an opportunity to elect between deleting the improper claims or having the entire motion treated as a successive application); United States v. McRae, 793 F.3d 392, 400 (4th Cir. 2015) (same); Winestock, 340 F.3d at 207 (same).

IV. Conclusion

For the aforementioned reasons, petitioner's motion to set aside judgment [DE-61] is ALLOWED and the court will set an evidentiary hearing by separate order. However, the court will STAY this proceeding to permit respondent to appeal this ruling to the Fourth Circuit.[8] The parties shall notify the court within ten days of the conclusion of the proceedings in the court of appeals. If respondent does not intend to appeal, he is instructed to notify the court within seven days of the

[8]This order shall not be construed to prevent petitioner from filing an application in the court of appeals under 28 U.S.C. § 2244, referencing the instant matter as a protective filing. See, e.g., Pace v. DiGuglielmo, 544 U.S. 408, 416 (2005).

entry of this order.

SO ORDERED, this the 27 day of March, 2017.

TERRENCE W. BOYLE
United States District Judge

STATE OF NORTH CAROLINA

NASH COUNTY

FILED
15 JUN 16 PM 2:28
NASH COUNTY, C.S.C.
BY RCJ

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NOS. 93 CRS 14709, 14711

STATE OF NORTH CAROLINA)
)
v.) ORDER
)
TIMOTHY RICHARDSON,)
Defendant.)

THIS MATTER coming on to be heard before the undersigned Superior Court Judge upon defendant's Amended Motion for Appropriate Relief, State's Answer to Defendant's Amended Motion for Appropriate Relief and State's Motion to Deny Defendant's Amended Motion for Appropriate Relief on the Pleadings, and after reviewing the documents attached thereto and reviewing the record proper, the Court makes the following Findings of Fact and Conclusions of Law:

I. PROCEDURAL HISTORY

1. Richardson was convicted of first degree murder on 25 May 1995. The jury found Richardson guilty of first-degree murder on three separate bases: (1) malice, premeditation, and deliberation; (2) felony murder; and (3) lying in wait. The jury also returned verdicts of guilty of first-degree kidnapping and not guilty of robbery with a dangerous weapon. A capital sentencing proceeding was held, and the jury returned an unanimous recommendation of death for the first-degree murder conviction. This Court sentenced Richardson to death for the murder of Ms. Rich and sentenced Richardson to a consecutive term of forty years' imprisonment on the first-degree kidnapping conviction.

I hereby certify that the foregoing is a true and accurate copy as taken from and compared with this original on record in this office _____ and Witness my hand and official seal.
This 18 day of August, 2015
Kathy C. Jones, Asst CSC, 2015
Clerk of Superior Court

2. On 24 July 1997, the North Carolina Supreme Court affirmed the conviction and sentence of death. State v. Richardson, 346 N.C. 520, 488 S.E.2d 148 (1997). The United States Supreme Court denied certiorari. Richardson v. North Carolina, 522 U.S. 1056 (1998).

3. On 18 March 1999, Richardson filed a Motion for Appropriate Relief ("MAR") in the Superior Court of Nash County challenging his 1995 conviction and death sentence for the first-degree murder of Tracy Marie Rich. The State, on 10 April 2001, filed its Response to Motion for Appropriate Relief and Motion for Denial Without Evidentiary Hearing. Richardson filed Amendments to his Motion for Appropriate Relief on 13 June 2001 ("AMAR 1") and on 31 January 2002 ("AMAR 2"). This Court entered an Order on 9 April 2002 denying all claims except a mental retardation claim contained in the second amendment filed 31 January 2002.

4. On 17 June 2005, this Court held an evidentiary hearing on Richardson's mental retardation claim. At the close of the hearing, this Court directed the State to prepare an Order denying the claim and dictated findings of fact to be used in the proposed Order. The written Order was signed that same day and was filed on 29 July 2005.

5. On 13 July 2005, Richardson filed an Amendment to Motion for Appropriate Relief ("AMAR 3") and Motion to Amend Motion for Appropriate Relief to Conform to Evidence Presented on 17 June 2005. This Court entered a second Order on 29 July 2005 denying this motion to amend. By Order dated 26 August 2008, the Supreme Court of North Carolina denied Petitioner's Petition for Writ of Certiorari to review the denial of his State post-conviction orders.

6. After completing Federal Habeas Review unsuccessfully, Richardson then filed this fourth amendment to his motion for appropriate relief on or about 20 January 2015.

I hereby certify that the foregoing is a true and accurate copy as taken from and compared with this original on record in this office _____ and

Witness my hand and official seat.

This 18 day of August, 2015

Kathy C. Jones, Deputy CSC, 2015

Clerk of Superior Court

II. FACTUAL SETTING

7. The facts of the murder of Ms. Rich are detailed by the North Carolina Supreme Court in State v. Richardson, 346 N.C. at 526-28, 488 S.E.2d at 151-52.

III. CLAIMS RAISED IN THE FOURTH AMENDED MAR

8. In his Fourth Amended MAR Richardson alleges the following claims:

I. TIMOTHY RICHARDSON'S INTELLECTUAL DISABILITY MUST BE CONSIDERED IN LIGHT OF NEW EVIDENCE UNDER STANDARDS ARTICULATED IN HALL V. FLORIDA

II. APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

CLAIM I

The Court makes the following findings of fact and conclusions of law as to Claim I as follows:

9. Richardson has failed to show the existence of the asserted ground for relief. N.C. Gen Stat.§ 15A-1420(c)(6); Hall v. Florida, 134 S. Ct. 1986 (2014); Atkins v. Virginia, 536 U.S. 304 (2002).

10. This claim procedurally barred and is alternatively without merit.

Procedural Bar

11. N.C. Gen. Stat. § 15A-1419(a)(2) states:

> (a) The following are grounds for the denial of a motion for appropriate relief, including motions filed in capital cases:
>
> ...

> (2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.

12. In his AMAR, defendant claims that he is intellectually disabled.[1] This is same claim was raised by defendant on a previous post-conviction MAR and previously denied by this Court.

13. Hall v. Florida is not a "retroactively effective change in the law " that would prevent the application of N.C. Gen. Stat. § 15A-1419(a)(2). The United States Supreme Court has not held that its ruling in Hall v. Florida is to be applied retroactively on collateral review. A new constitutional rule applies retroactively in collateral review only if the United States Supreme Court expressly holds that the rule is retroactive. Tyler v. Cain, 533 U.S. 656, 663 (2001).

14. Because this claim was previously raised and denied by this Court, it is barred by N.C. Gen. Stat. § 15A-1419(a)(2).

Merits

15. In addition to being procedurally barred by N.C. Gen. Stat. § 15A-1419(a)(2) this claim is also without merit.

Hall v. Florida does not invalidate north carolina's mental retardation statute

16. In Hall the United States Supreme Court held that the Florida Supreme Court's interpretation of a Florida statute governing claims of mental retardation in capital cases was

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[1] In this Court's prior order, it found Richardson was not "mentally retarded." In Hall v Florida, the United States Supreme Court used the term "intellectual disability." While the two phrases are interchangeable, the Court will use the term "intellectual disability" to be consistent with the United States Supreme Court and current medical terminology.

unconstitutional. Hall, 134 S. Ct. at 1990.

17. The United States Supreme Court did not find that Florida's statute as written was unconstitutional. This is relevant because North Carolina's mental retardation statute is very similar to Florida's.

18. The United States Supreme Court held that Florida's statute could be interpreted consistent with Atkins because nothing in the statute precluded the consideration of the standard error of measurement when evaluating the IQ score and the statute did not preclude consideration of limitations in adaptive functioning if the IQ threshold had not been met. Hall, 134 S. Ct. at 1994.

19. The North Carolina Supreme Court has not interpreted North Carolina's statute to preclude consideration of the standard error of measurement or to limit the introduction of evidence if the threshold showing of an IQ score below 70 has not been met. Therefore, North Carolina's statute, like the Florida statute, can be – and has been in this case specifically – interpreted consistently with Atkins.

20. In the present case Richardson was allowed to present evidence of his alleged deficits in adaptive functioning in a full evidentiary hearing without restriction. This Court allowed evidence on the standard error of measurement. Nor did this Court limit Richardson's presentation of evidence regarding his alleged limitations in adaptive functioning. These factors establish that Hall v. Florida has no effect on this Court's prior determination that Richardson is not intellectually disabled.

Nothing in Hall Alters this Court's
Prior Determination That Defendant Was Not Intellectually Disabled

21. Richardson was granted a full evidentiary hearing during which this Court considered all of Richardson's IQ test scores, without limitation, as well as evidence of his alleged limitations

in adaptive functioning. This Court did not limit or restrict the evidence presented by Richardson in any way.

22. At his evidentiary hearing, Richardson was allowed to present evidence and argument on the standard error of measurement. The State's expert witness also testified regarding the standard error of measurement. Unlike in Hall, this Court did not restrict the evidence presented about the application of the standard error of measurement and has already considered that evidence.

23. Richardson was also not precluded from presenting evidence of his alleged limitations in adaptive functioning. The State argued at the outset of the hearing that Richardson should have to show an IQ score of 70 or below before being granted an opportunity to present evidence at the hearing. After rejecting the State's argument to limit the presentation, this Court proceeded to conduct a full evidentiary hearing wherein Richardson was allowed to present evidence of alleged significant limitations in adaptive functioning. In effect, this Court has already interpreted North Carolina's law consistently with Hall.

24. Richardson was never precluded from offering any evidence supporting his mental retardation claim at the previous hearing.

25. While Hall v. Florida does not invalidate this Court's prior determination that Richardson is not intellectually disabled, even if this Court did re-consider it's prior determination, Richardson has provided no evidence to support this Court finding him intellectually disabled.

26. The Hall decision did not alter the opinion of Dr. Mark Hazelrigg that Richardson is not intellectually disabled. Dr. Hazelrigg is the Director of the Forensic Outpatient Evaluation Service at Central Regional hospital at Butner . Dr. Hazelrigg assessed Richardson and offered his expert testimony at the prior evidentiary hearing that Richardson was not mentally retarded.

27. In the affidavit attached to this answer and motion, Dr. Hazelrigg clarifies that his opinion "remains consistent" that Richardson is not intellectually disabled, noting that "[n]othing from Hall v. Florida, or developments in the field of mental health" has affected his conclusion that Richardson is not intellectually disabled.

28. Nothing in Hall or the materials submitted by defendant in support of this AMAR alters this Court's prior evaluation of Richardson's intellectually disability claim.

Denial on the Pleadings

29. As this Court can determine from the motion and any supporting or opposing information presented that this claim is procedurally barred and alternatively without merit, an evidentiary hearing is not necessary to decide the issues raised in this claim. N.C. Gen. Stat. § 15A-1420(c)(1) and State v. McHone, 348 N.C. 254, 257, 499 S.E.2d 761, 762-63 (1998), cert. denied, 528 U.S. 1095, 120 S.Ct. 835, 145 L. Ed. 2d 702 (2000).

CLAIM II

The Court makes the following findings of fact and conclusions of law as to Claim II as follows:

30. N.C. Gen. Stat. § 15A-1419(a)(1) states:

> (a) The following are grounds for the denial of a motion for appropriate relief, including motions filed in capital cases:
>
> > (1) Upon a previous motion made pursuant to this Article, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. This subdivision does not apply when the previous motion was made within 10 days after entry of judgment or the previous motion was made during the pendency of the direct appeal.

I hereby certify that the foregoing is a true and accurate copy as taken from and compared with this original on record in this office _____ and

Witness my hand and official seal.

this 18 day of August, 2015

_____, 2015
Clerk of Superior Court

31. Richardson was in a position to raise this issue in previous MARs and Amendments brought in post-conviction.

32. Therefore this claim of appellate ineffectiveness of counsel, apparent from the record, must have been brought in the previously MARs. As it was not, the claim is barred by N.C. Gen. Stat. § 15A-1419(a)(1).

33. As this Court can determine from the motion and any supporting or opposing information presented that this claim is procedurally barred, an evidentiary hearing is not necessary to decide the issues raised in this claim. N.C. Gen. Stat. § 15A-1420(c)(1) and State v. McHone, 348 N.C. 254, 257, 499 S.E.2d 761, 762-63 (1998), cert. denied, 528 U.S. 1095, 120 S.Ct. 835, 145 L. Ed. 2d 702 (2000).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is ORDERED that:

1. Richardson's Motion for Appropriate Relief is DENIED;

2. the State's Motion for Denial of Defendant's Motion for Appropriate Relief on the Pleadings is ALLOWED;

3. the Clerk of Court is to provide a copy of this ORDER to the District Attorney, the Special Deputy Attorney General representing the State, and to post-conviction counsel.

SO ORDERED, this the 15th day of June, 2015.

The Honorable Quentin T. Sumner
Senior Resident Superior Court Judge Presiding

I hereby certify that the foregoing is a true and accurate copy as taken from and compared with this original on record in this office _____ and

Witness my hand and official seal.

This 18 day of August, 2015

Kathy C. Jones, Asst. CSC, 2015
Clerk of Superior Court

6/18/2015 cc. D.A. Office Atty. Gen's office - Jill Board

FILED: August 9, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-3
(5:08-hc-02163-BO)

TIMOTHY RICHARDSON

Petitioner - Appellee

v.

EDWARD THOMAS, Warden, Central Prison, Raleigh, North Carolina

Respondent - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge Keenan, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk