DOCKET NO. _____

OCTOBER TERM 2020

IN THE

SUPREME COURT OF THE UNITED STATES

HARRY FRANKLIN PHILLIPS
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In *Hall v. Florida*, 572 U.S. 701 (2014), this Court found the Florida Supreme Court's application of its Intellectual Disability statute unconstitutional under *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Walls v. State*, 213 So. 3d 340 (2016) (*per curiam*), the Florida Supreme Court agreed that its prior statutory interpretation had unconstitutionally restricted *Atkins* claims to a smaller subgroup of individuals than recognized by the medical community and determined *Hall* to be retroactive to those individuals, like Mr. Phillips, who had timely raised *Atkins* claims. As a result, capital defendants who were denied under the unconstitutional pre-*Hall* framework were entitled to receive a new, "holistic" review of their *Atkins* claims, including Mr. Phillips. However, on appeal from the denial of his *Atkins/Hall* claim, a newly constituted five-Justice Florida Supreme Court *sua sponte* reversed its decision in *Walls*, held Phillips was not entitled to have his intellectual disability claim analyzed under the *Hall* framework, and determined that *Hall* announced a new non-watershed rule for Eighth Amendment purposes and thus was not retroactive. The questions presented are:

Whether a state court must give retroactive effect on collateral review to the rule announced in *Hall* because the Supremacy Clause, as held in *Montgomery v. Louisiana,* 136 S.Ct. 718 (2016), mandates that a State court cannot deny a prisoner's claim that his sentence is violative of the federal constitution by interpreting a case such as *Hall* as a mere procedural modification of the substantive holding of *Atkins* but rather the State court must give effect to *Atkins*' substantive holding?

Does the Florida Supreme Court's decision in *Phillips*, denying some capital defendants the retroactive effect of *Hall* , while having given retroactive effect of *Hall*

to other similarly situated capital defendants, create an unacceptably disparate and unequal death penalty system in violation of the Eighth Amendment?

Does the Florida Supreme Court's decision in *Phillips* violate the *ex post facto clause* of the United States Constitution?

PARTIES TO THE PROCEEDINGS

Petitioner Harry Franklin Phillips was the movant in the trial court and the appellant in the Florida Supreme Court.

Respondent State of Florida was the respondent in the trial court and the appellee in the Florida Supreme Court.

NOTICE OF RELATED CASES

Pursuant to this Court's Rule 14.1(b)(iii), these are related cases:

Underlying Trial:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: February 1, 1984

Direct Appeal:
Florida Supreme Court
Phillips v. State, 476 So.2d 194 (Fla. 1985)
Judgment Entered: August 30, 1985

Habeas Corpus After Death Warrant Signed:
Florida Supreme Court
Phillips v. Dugger, 515 So. 2d 227 (Fla. 1987)
Judgment Entered: November 19, 1987

First Postconviction Proceeding:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: February 13, 1989

Florida Supreme Court
Phillips v. State, 608 So.2d 778 (Fla. 1992)
Judgment Entered: September 24, 1992

Supreme Court of the United States
Phillips v. Florida, 509 U.S. 908 (1993)
Judgment Entered: June 21, 1993

Resentencing Proceeding:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: April 20, 1994

Second Direct Appeal:
Florida Supreme Court
Phillips v. State, 705 So.2d 1320 (Fla. 1997)
Judgement Entered: September 25, 1997

Supreme Court of the United States
Phillips v. Florida, 525 U.S. 880 (1998)

Judgment Entered: October 5, 1998

Second Postconviction Proceeding:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: August 28, 2000

Florida Supreme Court
Phillips v. State, 894 So.2d 28 (Fla. 2004)
Judgment Entered: As Revised on Denial of Rehearing, January 27, 2005

Third and Fourth Postconviction proceedings:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: October 23, 2004

Postconviction Proceeding on Intellectual Disability
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: May 5, 2006

Florida Supreme Court
Unpublished order, Case No. SC04-2476
Judgment Entered: June 21, 2007

Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: September 24, 2007

Florida Supreme Court
Phillips v. State, 984 So.2d 503 (Fla. 2008)
Judgment Entered: March 20, 2008

Florida Supreme Court
Phillips v. State, 996 So.2d 859 (Fla. 2008)
Judgment Entered: September 23, 2008

Fifth Postconviction Proceeding:
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: January 27, 2011

Florida Supreme Court
Unpublished Order, Case No. SC11-472
Judgment Entered: April 26, 2011

United States District Court for the Southern District of Florida
Phillips v. Jones, No. 08-23420 (S.D. Fla. Nov. 19, 2015), as corrected.
Judgment Entered: November 19, 2015

United States Court of Appeals for the Eleventh Circuit
Phillips v. Secretary, Florida Department of Corrections, No. 15-15714-P
Stay Entered: March 2, 2016

Sixth Postconviction Proceeding:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: April 27, 2017

Florida Supreme Court
Phillips v. State, 234 So.3d 547 (Fla. 2018)
Judgment Entered: January 22, 2018

Supreme Court of the United States
Phillips v. Florida, 139 S. Ct. 187 (2018)
Judgment Entered: October 1, 2018

Seventh Postconviction Proceeding:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: June 14, 2018

Florida Supreme Court
Phillips v. State, 299 So.3d 1013 (Fla. 2020)
Judgment Entered: May 20, 2020

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INTRODUCTION

Harry Franklin Phillips' mental ability has been at issue in his case from the beginning; Phillips having first raised a claim, in 1987, that his original trial lawyers had failed to recognize, investigate and present evidence of his low IQ. Yet, Phillips has been repeatedly denied the scientifically sound holistic assessment required by the Eighth Amendment.

After this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), Phillips timely asserted that he was constitutionally ineligible for the death penalty due to his intellectual disability. Phillips was denied relief premised on the Florida Supreme Court's wrongly decided opinion in *Cherry v. State*, 959 So.2d 702 (Fla. 2007) interpreting Florida's intellectual disability statute to require a strict IQ cut-off of 70.[1] This Court held the rule in *Cherry* unconstitutional in *Hall v. Florida*, 572 U.S. 701 (2014), finding the Florida Supreme Court interpreted its statute in violation of the Eighth Amendment, "[b]y failing to take into account the standard error of measurement [inherent in IQ testing], [so that] 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." *Hall*, 572 U.S. at 724.

On remand in *Hall v. State*, 201 So. 3d 628 (Fla. 2016), the Florida Supreme Court acknowledged it had wrongly "disregard[ed] established medical practice in

[1] Indeed, the *Cherry* opinion and the rule it announced had been widely criticized. By the end of 2013, Florida courts had denied every single *Atkins* claim presented. John H. Blume et. al., *A Tale of Two (and Possibly Three Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of A Categorical Bar*, 23 Wm. & Mary Bill Rts. J. 393, 412 (2014) (of the 24 intellectually disability cases identified, every single case has been denied on the merits.)

two interrelated ways." *Hall v. State*, 201 So. 3d at 634. After recognizing that its interpretation of Fla. Stat. § 921.137 was inconsistent with the medical community's diagnostic framework, the court agreed that "fixed number IQ scores" are not determinative of intellectual disability. *Id.* Rather, "Florida courts must also use other indicative evidence such as past performance, environment, and upbringing," in order to properly adjudicate a claim of intellectual disability. *Id.*

Capital defendants in Florida filed successive motions pursuant to Florida law asserting they were intellectually disabled within the meaning of *Hall v. Florida*. In *Walls v. State*, 213 So. 3d 440 (Fla. 2016), a majority of the Florida Supreme Court concluded *Hall* warrants retroactive application because "the *Hall* decision requires courts to consider all prongs of the test in tandem. As we have recognized, this means that 'if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of the other prongs.' *Oats v. State*, 181 So. 3d 457, 467-68 (Fla. 2015). The rejection of the strict IQ score cutoff increases the number of potential cases in which the State cannot impose the death penalty, while requiring a more holistic review means more defendants may be eligible for relief…" *Walls v. State*, 213 So. 3d at 346.

The Florida Supreme Court reversed and remanded several cases for new evidentiary hearings to ensure capital defendants received a "fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 572 U.S. at 724. *See e.g.*, *Haliburton v. State*, 163 So. 3d. 509 (Fla. 2015); *Oats v. State*, 181 So. 3d 457

(Fla. 2015); *Thompson v. State*, 208 So. 3d 49 (Fla. 2016); *Franqui v. State*, 211 So.3d 1026 (Fla. 2017); *Nixon v. State*, 2017 WL 462148 (Fla. Feb. 3, 2017).

Phillips, like many other capital defendants who had timely filed *Atkins* claims that were denied pre-*Hall*, also filed a timely successive motion. While the 2018 state circuit court declined to grant an entire new evidentiary hearing, the court agreed to hear argument at a *Huff*[2] hearing and to conduct an analysis of Phillips' ID claim consistent with *Hall*. The court considered the report of a new 2018 evaluation and conduct a de novo review of the prior 2006 evidentiary proceeding, expressly applying *Hall* and *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore* I). After concluding the 2006 circuit court grossly erred in its credibility analysis of the experts, the court reviewed the full record and expressly rejected the State's expert's findings. The 2018 court subsequently found, for the first time, that in light of *Hall*, Phillips's IQ scores of 75, 74, and 70, met the significantly sub average intellectual functioning prong (prong 1). And while the court also found, for the first time, that Phillips established onset before age 18 (prong 3), the court concluded that he still could not establish concurrent adaptive deficits (prong 2) based on factors expressly or impliedly rejected by this Court in *Moore.*

Phillips timely appealed to the Florida Supreme Court arguing the circuit court erred as to its ruling on adaptive functioning noting that the court's analysis improperly focused on "adaptive strengths" to negate "adaptive deficits" contrary to prevailing clinical and medical standards. The State did not object to and in fact

[2] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

conceded that Phillips' claim was properly before the courts as *Hall* was retroactive, and thus neither Party briefed retroactivity.

On May 21, 2020, a newly constituted five-Justice Florida Supreme Court *sua sponte* addressed retroactivity as it applied to Phillips' claim and determined that Phillips was not entitled to retroactive application of *Hall* under State or federal law because *Hall* merely "announced a new procedural rule" that "regulates only the manner of determining the defendant's culpability." *Phillips v. State,* 299 So. 3d 1013, 1022 (Fla. 2020). Justice Labarga dissented, pointing out that once again the newly formed court reversed prior death penalty precedent and in so doing created an "increased risk that certain individuals may be executed even if they are intellectually disabled." *Id.* at 1024 (Labarga, J., dissenting). Labarga further noted this Court's admonition, that "states do not have 'unfettered discretion to define the full scope of the constitutional protection.'" *Id.* (quoting *Hall v. Florida,* 134 S.Ct. at 1986). Labarga rejected the majority's conclusion that "*Hall* was a mere procedural evolution in the law," and argued that Equal Protection concerns were raised because some capital defendants had received the benefits of *Hall,* but similarly situated others, like Phillips, would not, based on mere happenstance. *Id.* at 1025-26. *See e.g.*, *Herring v. State*, 2017 WL 1192999 (Fla. Mar. 31, 2017) (declining to remand for a new evidentiary hearing as IQ scores of 80, 81, 72, and 76, clearly establish intellectual disability within the meaning of *Hall*. Thus, reversing for the imposition of a life sentence); *Cherry v. Jones*, 208 So. 3d 701 (Fla. 2016) (imposing a life sentence in light of 72 IQ score).

Phillips, at his first opportunity to address retroactivity, argued in his Motion for Rehearing that the court's holding raised a grave risk that Florida will execute intellectually disabled capital defendants and that the court's "determination that *Hall* announced a new non-watershed rule was error. *See Bousley v. United States*, 523 U.S. 614, 620 (1998)." (Motion for Rehearing, Appendix C, p. 22). Phillips further argued that the court's ruling was predicated on an erroneous understanding of the decision in *Hall;* that Hall must be applied retroactively as a "matter of federal constitutional due process and equal protection, again *citing Bousley, supra* (Appendix C, p. 21); that the decision violated the Eighth Amendment and resulted in an unacceptably arbitrary death penalty system, (Appendix C, p.21-23); and that the decision amounts to an *ex post facto* change in the law. (Appendix C, p. 23-25).

The court denied the Motion for Rehearing without any legal analysis. (Appendix B).

PETITION FOR WRIT OF CERTIORARI

Petitioner Harry Franklin Phillips respectfully petitions this Court for a writ of certiorari to review the judgment of the Florida Supreme Court in this case.

OPINIONS BELOW

The opinion of the Florida Supreme Court under review (App. A) is reported at 299 So. 3d 1013. The prior opinion of the Florida Supreme Court regarding a claim of intellectual disability in this case (App. E) is reported at 984 So. 2d 503. The opinion of the Florida Supreme Court granting resentencing (App. I) is reported at 608 So. 2d 778. The opinion of the Florida Supreme Court (App. G) following the denial of postconviction proceedings following resentencing is reported at 894 So. 2d. 28. The

findings of fact and conclusion of law of the 2018 and 2006 state circuit court (App. D; App.F respectively) are unreported.

STATEMENT OF JURISDICTION

The Florida Supreme Court entered its judgement on May 21, 2020, and denied Phillips' timely motion for rehearing on August 14, 2020. On March 19, 2020, this Court extended the time to file any petition for certiorari to 150 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISONS INVOLVED

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty or property, without due process of law." U.S. Const. amend. XIV.

The Supremacy Clause, Art. VI, cl. 2 provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The ex post facto Clause, Art. I, § 10, cl. 1 provides in pertinent part: No State shall pass [ ] any [ ] ex post facto Law.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

A. Conviction and Trial Proceedings

In 1983, Harry Franklin Phillips, was convicted of one count of first-degree murder in the tragic shooting of Bjorn Thomas Svenson, a parole supervisor. The State presented no physical or forensic evidence linking him to the crime, no

eyewitness testimony, and no specific murder weapon connecting him to the crime.[3] Phillips' jury recommended a sentence of death by a vote of seven (7) to five (5). On February 1, 1984, the trial court imposed a death sentence. The Florida Supreme Court affirmed on appeal. *Phillips v. State*, 476 So. 2d 194 (Fla. 1985).

Phillips filed his initial postconviction pleading pursuant to Fla. R. Crim. P. 3.850 in November of 1987. Amongst his claims, Phillips argued that he was deprived of an individualized and reliable sentencing determination due to trial counsel's failure to investigate and present mitigation. Specifically, Phillips alleged that trial counsel was either unaware of his low intelligence or should have been aware given the plethora of Florida Department of Corrections (FDOC) records reflecting his diminished psychological functioning, impairments, and intellectual and emotional deficiencies.[4] Accordingly, Phillips claimed that he was prejudiced by trial counsel's failure to secure and present critical background information due to his failure to hire

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[3] Phillips's conviction for capital murder rests on the testimony of five jailhouse snitches and the State's introduction of "letters" and "alibi notes" at trial. The State utilized these notes which were obtained from Phillips's cellmates to secure his conviction, establish statutory aggravation, and refute a diagnosis of intellectual disability. At every stage, mental health experts were provided copies and asked to opine whether the notes established Phillips was competent, capable of planning, and whether the notes effectively negated a diagnosis of intellectual disability as well as statutory mitigation. Unsurprisingly, the State experts placed great weight on the significance of these notes whereas the defense experts cautioned against considering these notes in isolation, noting that such emphasis could impede a proper assessment of intellectual disability.

[4] Trial counsel failed to obtain any of his client's prior incarceration records which revealed his low IQ and serious doubts about his level of functioning. *See* DOC Records, PCR-04. 432, DOC Psychological screening report dated June 23, 1964: (1964: "Mental condition at present is questionable. Was dull normal intelligence."); (1968: "This is his first felony conviction, and in fact, his first arrest. He apparently committed this crime due to his youth at the time of the crime and possibly contributing factor might be his rather low IQ."); (1970: describing Phillips as "not too bright").

a mental health expert for an evaluation.

B. 1988 Postconviction Proceedings and Evidentiary Hearing

Following the filing of an amended Fla. R. Crim. P. 3.850 motion, the circuit court granted a limited evidentiary hearing in 1988. At the evidentiary hearing, postconviction counsel presented Drs. Joyce Carbonell and Jethro Toomer and the State presented Drs. Lloyd Miller and Leonard Haber in rebuttal.

Dr. Carbonell evaluated Phillips in 1987. The evaluation included a 4.5-hour clinical interview with Phillips, a review of affidavits from family members and friends, as well as an interview of Phillips's former teacher. (PCR-04. Exh. C, 218-31); *Phillips v. State*, 894 So. 2d 28, 37 (Fla. 2004) (*per curiam*). More importantly, Dr. Carbonell reviewed numerous collateral records dating back to Phillips's childhood, including: school records, employment records, DOC records, parole records, jail records, attorney files, police reports, and court records including testimony and depositions. (T-88. 353-54). PCR-04. Ex. C 231. *Phillips v. State*, 894 So. 2d at 37. Phillips's records suggested that he had a history of below average intellectual functioning, therefore Dr. Carbonell administered a battery of tests, including the Weschsler Adult Intelligence Scale Revised (WAIS-R) on which Phillips obtained a full scale IQ score of 75. (T-88. 356). (FSC 2004 -*Id.* at 39.[5]

[5] Dr. Carbonell also administered the Wide Range Achievement Test, (WRAT-2), the Peabody Individual Achievement Test (PIAT), the Rorschach test, the Wechsler Memory Scale, the Canter Background procedure for the Bender Gestalt, and the Minnesota Multiphasic Personality Inventory (MMPI). FSC 2004 -*Id.* at 37.

Dr. Carbonell testified that the results from the intelligence testing are "uniformly low," indicating that the intellectual deficits have been present a long time. (T-88. 356-57). She testified that his score was congruent with other testing she performed, as well as the DOC's 1983 testing which reported a score of 73. (T.-88. 373); PCR-04. 463, "DOC Psychological Screening Report"; *See also, Phillips v. State*, 608 So. 2d 778, 783 (Fla. 1992) (*per curiam*) ("Phillips IQ was found to be between seventy-three and seventy-five, in the borderline intelligence range."). The results were also consistent with Phillips's poor performance in school.[6] (T-88. 373-74). Dr. Carbonell additionally testified about Phillips's deficiencies and adaptive problems, emphasizing his inability to learn from past experiences, communication deficits, and follower behavior.[7] Ultimately, Dr. Carbonell diagnosed Phillips as falling within the borderline range of intellectual disability ("ID").[8]

Dr. Toomer's evaluation also placed Phillips in the borderline range. His evaluation process involved a 3.5-hour clinical interview of Phillips as well as the

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[6] A pre-parole investigation report likewise confirms Phillips's poor school performance. *See* PCR-04. 428 ("subject… withdrew… to attend the colored high school in Kendall… when he left North Dade his grades were very poor and he was flunking most of his courses… he withdrew finally for good 2-2-62 after becoming a failing student").

[7] Dr. Carbonell noted that her testing results were consistent with what family members, friends, and teachers reported about Phillips—that he has always been socially isolated, withdrawn, and lacked social and inter-personal relationship skills. (T-88. 394-97); *Cf. Phillips v. State*, 608 So. 2d at 782, ("Phillips was a withdrawn, quiet child with no friends."). Moreover, DOC records dating back to 1974 indicate that Phillips has a "limited learning ability" and describe him as "easily led into trouble." PCR-88, A-14; (T-88. 436); *See also*, Affidavit of former teacher, Samuel Ford, PCR-04. 643 ("Harry was by no means a leader, and his natural shyness and reserve made him a natural, and easily manipulated, follower.").

[8] Although previous pleadings have used the term "mental retardation," this Petition uses the term "intellectual disability" or "ID." *See Hall v. Florida*, 572 U.S. at 704.

administration of several psychological testing instruments, including the Revised-Beta Examination on which Phillips obtained a full scale IQ score of 76. (T-88. 183). *Phillips v. State*, 894 So. 2d at 38. In order to corroborate Phillips's self-reported history, Dr. Toomer, like Dr. Carbonell, reviewed numerous documents and collateral information provided by individuals who had knowledge of Phillips's development over the years. (T-88. 170-78). *Id.* As a result of the background information, Dr. Toomer noted that Phillips's low IQ level did not change over time and more importantly, testing confirmed that his low functioning and deficiencies have existed a long time. (T-88. 200).

Dr. Toomer explained that Phillips's intellectual deficiencies needed to be considered in conjunction with his emotional deficits that came about as a result of the environment that he was exposed to. (T-88. 203). Phillips was born in 1945 in a labor camp in Belle Glade, Florida. PCR-04. 541-45. "His parents were migrant workers who often left their children unsupervised." *Phillips v. State*, 608 So. 2d at 782. In addition to growing up unsupervised, extremely impoverished, and facing segregation,[9] Phillips's "father physically abused him… and [his] mother…" until the father deserted the family when Phillips was roughly 11 years old. *Id.* (T-88. 203-04).

[9] Dr. Toomer opined that racism likely impacted Phillips's emotional and intellectual development given that family members, friends, and a former teacher recognized his inability to function yet no intervention or assistance was provided. *See* T-88. 243 ("I think that is a factor in that given the particular environment. Given the deficiencies, in terms of resources, in terms of how schools are funded and so forth and so on, I'm sure that was a factor at some point."). Race also appears to have impacted the court's view of the validity of Phillips's intelligence testing. *See* T-88. 264-65 (court interjecting to inquire whether the WAIS was normed on "white middle-class Americans" as he had never heard a "black person refer in any way to the expression cry over spilled milk.").

Since Phillips was so young and impressionable, Dr. Toomer explained that such trauma would have a lasting impact on his ability to regulate his emotions and behavior. (T-88. 204-05). Dr. Toomer pointed to the responses and affidavits of individuals who knew Phillips following the departure of his father as corroboration for the longstanding nature of his emotional deficits. *Id.* As a result of his intellectual and emotional deficits, Dr. Toomer characterized Phillips as an individual with a child-like level of understanding who lacked the ability to make rational choices, was easily manipulated, and was motivated by a need to be accepted. (T-88. 259-62).

Both Drs. Carbonell and Toomer also testified about applicable statutory mitigation. They "testified that Phillips is emotionally, intellectually, and socially deficient, [and] that he has lifelong deficits in adaptive functioning…" *Phillips v. State*, 608 So. 2d at 782-83. Specifically, Dr. Carbonell noted Phillips's history of a low IQ, which was corroborated by both school records and DOC records. (T-88. 439). According to DOC and parole records, Phillips spent the majority of his life in prison.

At the age of 16, Phillips and two co-defendants were arrested for the attempted murder of a non-uniformed State Trooper, yet only Phillips was convicted and sent to an adult prison. Significantly, the arrest and prosecution had racial overtones premised on an allegation that Phillips had whistled at a white woman who happened to be the girlfriend of the State Trooper. [10] PCR-04. 427. In 1970, Phillips

[10] Affidavits and police reports suggest the 1960 conviction for attempted murder of a non-uniformed state trooper was the byproduct of racial tensions and segregation in Opa Locka. *See* PCR-88. Exh. A-1; PCR-04. 497-501, Affidavit of Ida Phillips Stanley, ("The strict segregation in Opa Locka when we were growing up created a whole lot of problems…Even though blacks were a majority of the population of the city, the police force was all white. The police played a big part in enforcing segregation in the city." When the police came to arrest

received parole, moved back home with his mother, and began working as a garbage collector at the Miami Sanitation Department. PCR-88, B-10; PCR-04. 665; *Phillips v. State*, 984 So. 2d 503, 507 (2008) (*per curiam*). After working for only two years, in 1973, Phillips was arrested yet again with a co-defendant. Phillips received a lengthy sentence but eventually received parole in June of 1980. Upon his release, Phillips moved back in with his mother and became employed as a dishwasher at Neighbor's Restaurant in Hialeah. PCR-88, B-9; PCR-04. 444. However, after only six months, Phillips was arrested for a parole violation because he had driven to Broward County without permission. (T-88. 394). According to Dr. Carbonell, this incident reflected yet another example of Phillips' inability to effectively adapt to his environment.[11] (T-88. 394-95); PCR-04. 1073-74. Phillips was subsequently placed in Baker County institution and tried to escape, but due to his inability to plan, he was instantly caught and received another year in prison. PCR-04. 451-52.

Upon release in August of 1982, at the age of 37, Phillips moved back in with his mother and returned to work for his previous employer, Neighbor's Restaurant. After approximately two weeks of employment, Phillips was arrested for the present

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Harry, "they said that Harry and some other boys from the neighborhood had whistled at a white woman, and that her boyfriend, who was an off-duty trooper, came up to Harry and the other boys and started talking stuff about 'n******' not knowing their place. A fight broke out, and the trooper ended up getting shot"). The police report also confirms the entire incident transpired because Phillips and his co-defendants whistled at a white woman who subsequently reported the incident to her state trooper boyfriend upon returning home. *See* PCR-04. 427 ("a colored man made the almost fatal mistake of whistling at a white girl in that area").

[11] A DOC report dated March 24, 1981, likewise confirms: "[Phillips] does not appear to have the ability to learn from past experiences and incarcerations."

offense. PCR-04. 438.

In response, the State presented Drs. Haber and Miller. According to their individual reports as well as their respective testimonies, both experts were only hired to examine Phillips's "competency to stand trial, when he did, in 1982-83." (T-88. 679, 821). *Phillips v. State*, 608 So. 2d at 783. Both evaluations were conducted contemporaneously from 12:05 pm to 2:40 pm in 1987. (T-88. 685) PCR-04. 807. And both experts retrospectively concluded that Phillips was "competent to stand trial" in 1983. (T-88. 697, 817, 823) PCR-04. 904; 909. Neither expert expressed any opinions regarding mitigating circumstances, nor provided any testimony in rebuttal of Drs. Carbonell and Toomer. In fact, Dr. Miller agreed that Phillips's "level of intelligence was in the dull average to borderline range of functioning."[12] (T-88. 865) PCR-04. 951. And while Dr. Haber did not dispute the IQ results obtained by Dr. Carbonell, he disagreed with her finding of ID. (T-88. 682). As Dr. Haber explained, under the professionally accepted designations of the time, scores ranging "between 75 and 87 clearly fall in the category of borderline intellectual functioning and/or low average intellectual functioning, far removed from the condition known as mental retardation." (T-88. 684). PCR-04. 891.

On February 13, 1989, the circuit court denied relief. Phillips appealed and the Florida Supreme Court remanded for a new penalty phase due to ineffective

[12] Dr. Miller also testified that Phillips's "general level of intelligence may be assessed as less than average but certainly not in the retarded range. One of the parameters I use was the ability to obtain a driver's license. He stated although he flunked the test once, he was able to pass the written driver's test." (T-88. 827). On cross-examination, however, it became clear, that due to Dr. Miller's reliance on self-reporting, he was unaware of collateral records indicating that Phillips had taken the test three times before finally passing. (T-88. 875-76).

assistance of counsel at sentencing. *Phillips v. State*, 608 So. 2d 778, 783 (Fla. 1992) (noting that the mental health testimony presented at the evidentiary hearing "provides strong mental mitigation and was essentially unrebutted. The testimony of the State experts related solely to the issue of competency. While these experts testified that they did not believe Phillips had significant mental or emotional disorders, they offered no opinion as to the applicability of the statutory mental mitigators, **and even these experts agreed that Phillips' intellectual functioning is at least low average and possibly borderline retarded**." (emphasis added)).

C. 1994 Resentencing Proceedings

On April 4, 1994, resentencing proceedings began. Phillips's resentencing counsel presented Dr. Toomer as well as the former testimony of Dr. Carbonell, as she was unable to testify live.[13] Both doctors once again opined that Phillips functions in the borderline range of ID. The State presented both Drs. Miller and Haber in rebuttal.

In his testimony, Dr. Miller accepted Phillips's IQ score and stated the 72 to 76 range would be in the "range of borderline intelligence. It would be clearly below an average individual which is in the 90 to 110 range." (T-94. 445). Dr. Miller explained that an individual in the borderline intelligence range could obtain a driver's license, "you don't have to be very smart to drive a car." (T-94. 446). PCR-04. 990. He also noted that a person with low intelligence could "perform manual work… and do[]

[13] Defense counsel sought to have Dr. Carbonell testify live, however she was ill at the time, and the State objected to the delay. The circuit court subsequently refused to grant Phillips's motion for a continuance. *Phillips v. State*, 894 So. 2d at 38.

what a supervisor asked him or her to do." *Id.* When asked whether Phillips's low intelligence establishes mitigation, Dr. Miller replied "[t]hat is correct" and outlined matters he had learned from Phillips confirming his low intelligence—such as not performing well in school, repeating classes, and low grades. (T-94. 473-74). PCR-04. 1017-18.

Dr. Haber testified that he did not do any other psychological intelligence testing because he had reviewed the testing of Drs. Toomer and Carbonell and was satisfied that a "complete battery had been done and there was no point to repeat it." (T-94. 654). PCR-04. 841. However, on cross-examination, Dr. Haber maintained that he disagreed with their conclusions. (T-94. 675) PCR-04. 862.

In April, 1994, Phillips was again sentenced to death by a vote of seven (7) to five (5). In the sentencing order, the trial court acknowledged, "that the defendant has a low IQ." 1994 Sentencing Order at 14. However, because the court found "Dr. Miller and Dr. Haber's testimony… inherently more credible," the court concluded that Phillips' "street smart[s]" negated any statutory mitigation. 1994 Sentencing Order at 12-15.

D. 1999 Postconviction Proceedings

On December 2, 1999, Phillips filed a Fla. R. Crim. P. 3.850 motion in the circuit court. In summarily denying the motion without an evidentiary hearing, the court noted that "the record is replete with evidence that the trial court acknowledged the Defendant's low IQ, abusive childhood, inadequate parental guidance and poor family background as non-statutory mitigating circumstances… Defendant's claim

fails to satisfy… the requirements of Strickland v. Washington, 466 U.S. 668 (1984)." (PCR-04. V.8. 113). Order dated 8/28/00.

On appeal, the Florida Supreme Court affirmed,[14] but ruled that Phillips could pursue his ID claim by filing a Fla. R. Crim. P. 3.203 motion in the circuit court. *Phillips v. State*, 894 So. 2d at 40. ("we do not preclude Phillips from raising the retroactive application of section 921.137 in a subsequent proceeding. Nor do we address the potential merits of a claim under *Atkins*…").[15] In denying his claim of ineffective assistance of counsel at the penalty phase, the court specifically found that defense counsel could not have been deficient because "[i]n this case, the record is clear that **each expert** not only testified extensively about the battery of tests administered to Phillips, they **each also testified that Phillips was borderline mentally retarded and probably brain-damaged**." *Phillips v. State*, 894 So. 2d at 38-39 (emphasis added).

In a separate concurring opinion, Justice Cantero explained why he believed Phillips was entitled to the benefits of *Atkins* as well as the new procedures set forth

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[14] The court noted, "[i]n sum, given the significant mental health investigation and testimony in the record, we hold that the trial court did not err in denying Phillips's claim without an evidentiary hearing." *Id.* at 39.

[15] *But see, id.* at 44-45, Pariente, C.J. and Anstead, J., concurring in part and in dissenting in part: "The ineffective assistance claim requires Phillips to demonstrate that had definitive evidence of his mental retardation been presented at the resentencing, such evidence would undermine our confidence in imposition of the death sentence, which was recommended by a bare majority of the jurors. Allowing Phillips a hearing pursuant to rule 3.203 while denying him a hearing on the ineffective assistance of counsel claim does not afford Phillips adequate review or protect his constitutional right to counsel. I would therefore grant Phillips an evidentiary hearing on the ineffective assistance of counsel claim so it can be pursued in tandem with a mental retardation claim." (internal reference omitted).

under Fla. R. Crim. P. 3.203. Relying on this Court's rejection of the *Penry*[16] rule in *Atkins*, Justice Cantero concluded that retroactivity is apparent under the standards articulated in both *Teague v. Lane*, 489 U.S. 288 (1989) and *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *Id.* at 43-44. The Florida Supreme Court subsequently relinquished jurisdiction and an evidentiary hearing was held February 13-16, 2006.

E. 2006 ID Evidentiary Hearing Pursuant to Fla. R. Crim. Pro. 3.203

At the evidentiary hearing, Phillips presented two experts, Dr. Glenn Ross Caddy and Dr. Dennis Keyes. Dr. Carbonell's 1987 evaluation of Phillips was introduced through the testimony of Dr. Caddy. In addition, the prior 1988 evidentiary proceedings as well as the 1994 resentencing proceedings were introduced as part of the record. The State called only one expert witness, Dr. Enrique Suarez.

Dr. Caddy, a clinical psychologist, testified that he was hired to evaluate Phillips' intelligence and administered the WAIS-III on which Phillips obtained a full scale IQ score of 70. (T-06. 14). Dr. Caddy explained that the IQ score fit within the accepted Standard Error of Measurement (SEM) of plus or minus five points and was congruent with other testing performed by Drs. Carbonell and Keyes. (T-06. 163-65). He also testified that Phillips's IQ scores consistently placed him in the borderline range of intellectual functioning. (T-06. 18). Although Dr. Caddy did not perform any adaptive functioning instruments, he testified about the medical community's

[16] *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) ("Thus, if we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review.").

diagnostic framework for assessing ID. As Dr. Caddy explained, the DSM-IV allows for an ID diagnosis in individuals with IQ scores ranging between 70 and 75 provided that the individual also has significant deficits in adaptive behavior. (T-06. 161).

Dr. Keyes, a special education professor and school psychologist, also evaluated Phillips. His evaluation involved a mixture of document review, interviews, and a battery of psychological testing instruments. The background materials which Dr. Keyes reviewed contained the same records reviewed by Drs. Carbonell and Toomer and were submitted as defense exhibits, H, I, and J. The three volumes include: police records, school records, prison medical records, probation records, court records, witness affidavits and prior testimonies, employment records, as well as the psychological reports of Drs. Haber, Miller, Toomer, and Carbonell, and their respective testimonies from 1988 and 1994. *See* PCR-18. 315-16.

After reviewing the collateral records and identifying several well-defined risk factors for developing ID, such as malnutrition, physical abuse, and parental neglect, Dr. Keyes administered the WAIS-III. Phillips obtained a full scale IQ score of 74. (T-06. 204). Dr. Keyes opined this score was consistent with prior scores Phillips obtained on intelligence tests. He testified that the four-point difference between his administration of the WAIS-III and Dr. Caddy's administration was not statistically significant. (T-06. 223).

In assessing Phillips's level of adaptive functioning, Dr. Keyes looked exclusively at how Phillips functioned during the developmental period before the age of 18. (T-06. 204). Dr. Keyes explained that since *Atkins* focuses on culpability, a

proper adaptive functioning assessment must consider how Phillips was functioning at the time of the crime. (T-06. 218-19). And because Phillips spent the majority of his life in prison, Dr. Keyes explained that it was crucial to assess how he functioned outside of such a structured environment. (T-06. 260). Thus, Dr. Keyes reviewed school and employment records, interviews from individuals who knew Phillips prior to incarceration, and conducted additional interviews before administering adaptive functioning instruments to Phillips's sister, a childhood friend, and Phillips himself.

After administering the Vineland and the Scales of Independent Behavior-Revised (SIB-R) and obtaining valid scores, Dr. Keyes concluded Phillips suffers from significant deficits in numerous areas of adaptive behavior. Dr. Keyes pointed to several stories he obtained from conducting additional interviews with childhood friends, family, and neighbors, to support his conclusion regarding Phillips's lifelong inability to adapt. For example, Phillips's childhood friend recognized his limitations, noting that he would need to accompany him when he needed to use a public bathroom as Phillips could not understand which bathroom to use and would either end up in the women's bathroom or the whites only bathroom. (T-06. 212).

In addition, Dr. Keyes explained that Phillips's short-lived employment history did not negate his adaptive deficits. (T-06. 221). He testified that individuals with ID can obtain drivers licenses and work full-time jobs involving low level labor or menial tasks. (T-06. 220-21). Lastly, Dr. Keyes concluded that Phillips's school records supported his finding of onset before 18. (T-06. 219). Ultimately, Dr. Keyes opined that Phillips is ID. (T-06. 222). *Phillips v. State*, 984 So. 2d at 508.

The State's only expert, Dr. Suarez, a neuropsychologist, administered the Test of Nonverbal Intelligence-III (TONI-III), "to assess Phillips's intellectual functioning." (FSC-08 *Id.*) Dr. Suarez administered this test despite Florida law explicitly excluding it as a method for determining intelligence. *See* Fla. Admin. Code r 65G-4.011 (specifying Stanford-Binet Intelligence Scale or the Wechsler Intelligence Scale as the only authorized intelligence tests).[17] Phillips obtained an 86 on the TONI-III, "which is in the low average range." (T-06. 412) (FSC-08 *Id.*)

Dr. Suarez also administered the MMPI to assess the validity and reliability of Phillips's IQ scores despite clinical practice cautioning against the use of the MMPI in individuals with ID. Dr. Suarez opined that his validity tests established that all of Phillips's prior low IQ scores were the product of malingering. *Id.* at 509. (2008 FSC opinion)

In determining Phillips's "concurrent" adaptive functioning, Dr. Suarez chose to administer the Adaptive Behavior Assessment System (ABAS) to six prison officials. PCR-04. 238 (Dr. Suarez report); PCR-18. 345. Dr. Suarez did not administer any testing or conduct any interviews with family members or friends who knew Phillips prior to age 18, and prior to his commitment to the adult prison system at 16. Unsurprisingly, prison officials reported Phillips adapted well to the structured environment on death row. Dr. Suarez then focused his analysis on instances of

[17] The court subsequently utilized this code to exclude the results from Dr. Carbonell's 1987 administration of the PIAT, noting that the PIAT is an invalid testing instrument under Florida law. *See* PCR-18. 340. Yet, the court did not comment on Dr. Suarez's improper use of the TONI-III as his sole measure of Phillips' intelligence nor did the court discredit the remainder of his findings.

alleged maladaptive behavior to emphasize that Phillips's adaptive strengths outweighed his deficits. Finally, Dr. Suarez concluded that Phillips's poor performance in school was the product of truancy and conduct problems as opposed to a disability. Dr. Suarez ultimately opined that Phillips is not ID. *Id.* 509.

Following the 2006 evidentiary hearing, the circuit court determined Phillips failed to establish all three prongs of ID. (App. F, p. 40-84). In rejecting Phillips's IQ scores as unreliable, the court noted, "the Defendant's borderline IQ scores of 74, 75,[18] and 70 are not precise… Additionally, the Defendant's sub average intellectual functioning must be noticeable." PCR-18. 342. In addition to discounting decades of records reflecting Phillips's borderline intelligence to reach this conclusion, the court found that because the DSM-IV suggests "malingering should be strongly suspected if the person has an anti-social personality," and because Phillips's "crime can… be considered an anti-social act," both defense experts lack credibility for failing to provide a "complete evaluation," as they did not administer validity testing.[19] *Id.* As a result, the court discredited both defense experts and gave their findings little to no

[18] The court rejected the valid 75 IQ score obtained by Dr. Carbonell in 1987, despite the Florida Supreme Court's prior opinions finding the score credible. In addition, the court failed to acknowledge the valid 73 IQ score obtained by DOC testing in 1983, which had also been found valid and reliable in prior appellate opinions.

[19] Interestingly, the court discounted both defense experts for failing to conduct validity testing yet Dr. Carbonell administered the same validity test as Dr. Suarez—the MMPI—in 1987 and obtained valid results when she obtained the 75 IQ score. PCR-04. 226. Even more perplexingly, the State's own expert, Dr. Haber, in both his 1988 and 1994 testimonies, questioned the appropriateness of the MMPI as it is not a "test of intelligence" nor is it a proper "tool for use with minority groups." *See* (T-94. 853); (T-88. 696). Even Dr. Miller, in his 1988 testimony, admitted the WAIS itself contains "specific empirical validation," thus negating the need for the administration of the MMPI to determine the validity of the results. (T-88. 895); PCR-04. 981.

weight. The court instead placed great weight on the findings of the State's sole expert, Dr. Suarez. Since Dr. Suarez administered validity testing as well as the ABAs to prison officials, the court determined that his "objective testing" and results undoubtedly established that Phillips was malingering. PCR-18. 345.

Before determining whether Phillips had demonstrated deficits in adaptive behavior, the court defined adaptive functioning as "how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background, and community setting." PCR-18. 335. The court relied heavily upon Dr. Suarez's opinion that "to get concurrent deficits, you have to rely on people [prison officials] who know the person now," as opposed to family members. PCR-18. *Id.* The court also agreed with Dr. Suarez's opinion that Phillips's employment history, ability to obtain a driver's license, purchase items, write "alibi notes," and adapt to life on death row, evinced a high level of adaptive functioning. PCR-18. 347-48. Lastly, the court adopted the State's position that maladaptive behavior and "street smarts" negate any deficits in Phillips's adaptive functioning.[20] PCR-18. 345-38.

As to manifestation before age 18, the court disregarded multiple affidavits from family members, friends, and a former teacher regarding Phillips's inability to learn and adapt as a child prior to entering the prison system. The court ultimately agreed with Dr. Suarez and concluded that Phillips's record of academic failure was

[20] The court also concluded that "because Defendant has been on death row for a number of years, there was no evidence of deficits of adaptive behavior in regards to home living, use of community resources, or leisure." PCR-18. 348.

the result of "skipping school" as opposed to "mental retardation." PCR-18. 349.[21]

On appeal, the Florida Supreme Court affirmed the lower court's ruling stating, among other issues, that, "We have consistently interpreted [Florida Statute § 921.137(1)] to require a defendant seeking exemption from execution to establish he has an IQ of 70 or below. See *Cherry* [*v. State*], 959 So. 2d at 711-14, (finding that Section 921.137 requires a strict cutoff of an IQ score of 70)." *Phillips,* 984 So. 2d 503, 510.

F. Federal Habeas Proceedings

Phillips timely filed a habeas petition in the U.S. District Court for the Southern District of Florida on December 10, 2008. The district court denied relief. Phillips filed a timely motion to alter and amend, which was denied on November 19, 2015. Phillips subsequently filed a certificate of appealability (COA) which was granted on January 22, 2016, with respect to his *Brady*[22] and *Giglio*[23] claims.

On February 10, 2016, Phillips moved to expand the COA to include his *Atkins* claim. Mr. Phillips Eleventh Circuit proceedings remain stayed as of the date of this filing

G. Current State Court Proceedings

On February 23, 2016, Phillips filed a successive *Hurst*-based Fla. R. Crim. P.

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[21] Had Dr. Suarez or the court actually reviewed prior records, the opposite conclusion would have been reached. *See* Dr. Toomer's testimony, (T-88. 212), "an interesting dynamic or piece of this picture is that Harry went to school, there were very few absences, very few instances of being tardy, but yet the grades were very poor."

[22] 373 U.S. 83 (1963).

[23] 405 U.S. 150 (1972).

3.851 motion. However, while his *Hurst* claims were pending, the Florida Supreme Court issued *Walls v. State* holding *Hall v. Florida* retroactive. In *Walls*, the court determined that although "Walls had an earlier evidentiary hearing as to intellectual disability and was allowed to present evidence of all three prongs of the test, he did not receive the type of holistic review to which he is now entitled." 213 So. 3d at 347.

In addition, this Court issued *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*). Phillips filed a motion to relinquish jurisdiction in the Florida Supreme Court to file a successive motion on the basis of *Hall*'s retroactivity as well as the applicability of *Moore I* to his case. The motion to relinquish was denied without prejudice for Phillips to file his claim in the state circuit court. Phillips timely filed his successive motion in light of *Hall*, *Walls*, and *Moore I* in the circuit court on February 28, 2018. PCR-18. 70-87.

H. The Circuit Courts Partial Reversal and De Novo Review

Prior to filing his motion, Phillips retained Dr. Keyes to conduct another evaluation. Dr. Keyes 2018 evaluation focused on adaptive functioning as Phillips's low IQ scores and onset before 18 had been documented by decades of records. Dr. Keyes administered the ABAS-III, the WRAT-IV, the Test of Memory Malingering (TOMM), and the Peabody-IV, all of which revealed the same results as his previous evaluation—that Phillips suffers from significant deficits in adaptive behavior. The new report not only explained the results of the evaluation, it also detailed how family members and friends had consistently described Phillips over the years, *i.e.*, as a "loner," "follower," and "slow." PCR-18. 303. The new report was filed for the record.

PCR-18. 296-304.

In response, the State alleged that even if Phillips's *Atkins* claim is not procedurally barred, he is still not entitled to relief as he cannot meet any prong of the post-*Hall* definition of ID. The circuit court, after declining to grant an evidentiary hearing, conducted a de novo review of the prior 2006 proceedings. As part of its "conjunctive and interrelated assessment" of all three prongs of the ID test, the court agreed to reconsider the prior court's findings as well as the evidence in light of *Hall* and *Moore I*. PCR-18. 396.

On June 14, 2018, the circuit court issued its order. PCR-18. 286-91. In its order, the court found, that in light of *Hall*, Phillips had in fact established, by clear and convincing evidence, both prongs 1 and 3. The court reached this determination, in part, because it found the findings of the State's expert, Dr. Suarez, entirely flawed. *See* PCR-18. 289 (discrediting Dr. Suarez for basing his entire "focus… towards a desired result, namely undermining a finding of ID, rather than being the neutral findings of an expert clinician"). With respect to onset before age 18, the court determined that Dr. Keyes testimony about Phillips's academic failure and poor grades, established prong 3. Despite these new findings, however, the court still concluded that Phillips is not ID as he could not establish concurrent adaptive deficits. PCR-18. 291.

In conducting the adaptive functioning analysis, the court erroneously focused on Phillips's perceived strengths and "indications" of "adaptive behaviors." PCR-18. 290. The order notes that "an individual with ID requires help with complex daily

living tasks," and because Phillips "knew how to drive, had two jobs as a dishwasher and a job as a short order cook," he clearly had adaptive strengths. PCR-18. 289. The court also observed that "people with ID are… at risk of being manipulated," yet Phillips had the ability to remain silent upon police questioning, thus he could not be considered easily manipulated. PCR-18. 290. In addition, while the court acknowledged that individuals with ID have impaired executive functioning, the court concluded that Phillips's criminal behavior—the "planning, execution and subsequent cover-up of the murder… [are] indicative of highly adaptive behavior."[24] PCR-18. 290. Although the court emphasized Phillips's perceived strengths, the court failed to recognize the documented evidence of his adaptive deficits, *i.e.*, his abused and impoverished childhood, parental abandonment, racial harassment, lack of social skills, inability to adapt or learn as evinced by DOC records, and the fact that he was incapable of ever living alone as an adult.

I. The Florida Supreme Court's Decision

Phillips appealed to the Florida Supreme Court arguing the circuit court erred in its adaptive functioning analysis in light of *Moore* I by relying on improper stereotypes. In response, the State asserted Phillips was procedurally barred from proving his *Atkins* claim. The State expressly conceded *Hall* was retroactive. (State's Answer Brief p. 27).

[24] In determining that Phillips's executive functioning is not impaired, the court relied heavily upon the "alibi notes" as evidence of a high level of functioning.

On May 20, 2020, the Florida Supreme Court denied Phillips' appeal. . In addition to rejecting the lower court's factual findings, reaffirming the 2008 findings, the court held the lower court improperly considered Phillips' adaptive functioning because Phillips had already "conclusively failed to establish prong 1" in 2008. *Phillips*, 299 So. 3d at 1024.

But more significantly, the Florida Supreme Court majority ruled, without any briefing on the issue, that Phillips was not entitled to the retroactive effect of *Hall* because *Hall* did not qualify as a new, substantive rule under *Teague. Id.,* at 1013.

REASONS FOR GRANTING THE WRIT

This case presents questions of great importance for this Court regarding the analysis of a State court's duty to give retroactive effect to a federal constitutional holding. This area of the law remains complicated and unclear to many lower courts and practitioners. In *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), this Court determined that a procedural component of a sentencing determination does not render a constitutional holding procedural and thus non-retroactive, but can be determined to give effect to a substantive holding and thereby be retroactive. *Id.* at 735. In so doing, this Court relied on the Supremacy Clause to determine that while States are left to the task of developing procedures to enforce federal constitutional rights, deference to this principle "should not be construed to demean the substantive character of the federal right." *Id.* Further, decisions explicating statutes favorably to criminal defendants are -and as matter of due process and equal protection must

be – applied retroactively. *Bousley* 523 U.S. 614 (1998). This Court should continue to clarify its retroactivity jurisprudence.

This Court has repeatedly held that a death sentence "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible.'" *Johnson v. Mississippi*, 486 U.S. 578, 584–85 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884–885, 887 n.24 (1983). The Florida Supreme Court's *sua sponte* reversal here undermines the integrity of the judicial system and results in arbitrary eligibility determinations.

Additionally, the Florida Supreme Court violated Phillips' rights under the ex post facto clause. This Court should clarify the application of the clause to judicial holdings such as the one at issue here.

1. **This Court Should Hold That The Florida Supreme Court's *Sua Sponte* Determination that *Hall* Did Not Announce a New, Non-Watershed Rule of Law for Eighth Amendment Purposes Conflicts with This Court's Retroactivity Doctrines.**

The conclusion of *Phillips* that *Hall* announced a new non-watershed rule of federal Eighth Amendment law for purposes of *Teague v. Lane,* 489 U.S. 288 (1989) was error. In *Walls*, the court clearly articulated that its rationale stemmed from the analysis conducted in *Falcon v. State*, 162 So. 3d 954 (Fla. 2015) (rejecting the State's argument that *Miller v. Alabama*, 567 U.S. 460 (2012) only invalidated the statute as applied to a subgroup of people and thus constituted a procedural refinement that did not warrant retroactive application). Guided by *Miller*, the *Walls* court concluded that *Hall* similarly identified and prohibited a penalty (a death sentence) for an exempt class of offenders (individuals with IQ scores ranging above 70). The court recognized

that while *Atkins* gives States the discretion to craft the procedures to determine ID, courts cannot ignore the medical community's diagnostic framework. Thus, at bare minimum, a court must not "view a single factor as dispositive of the conjunctive and interrelated assessment." *Hall*, 572 U.S 701 at 2001. Yet in the opinion below, that is precisely what occurred. The court refused to consider all three prongs in tandem because of its pre-*Hall* rejection of prong 1. The court justified this conclusion as well as its retreat from *Walls* by relying on *Montgomery v. Louisiana*[25], *Teague v. Lane*[26], and alleging the prior court erred in its *Witt v. State*[27] analysis. In labeling *Hall* as a mere procedural refinement, the court misapprehends federal constitutional principles, the effect of the Supremacy Clause on the States' obligations to enforce federal constitutional rights and fails to properly apply *Miller* and *Montgomery*.

In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court explained that its opinion did not categorically bar a particular penalty for a class of offenders or type of crime, rather it only mandated that the sentencer follow a *certain process before imposing a particular penalty*. Following this ruling, a Louisiana petitioner filed a motion for postconviction relief asserting *Miller* was substantive law. The Louisiana court disagreed and held *Miller* was not retroactive. In addressing the retroactive implications of *Miller* in *Montgomery v. Louisiana*, this Court acknowledged the procedural component of *Miller* but found that Louisiana's argument labeling *Miller*

[25] 136 S. Ct. 718 (2016).

[26] 489 U.S. 288 (1989).

[27] 387 So. 2d 922 (1980).

as a procedural rule "conflates a procedural requirement necessary to implement a substantive guarantee with a rule that 'regulate[s] only the manner of determining the defendant's culpability.'" 136 S. Ct. at 734-35. This Court concluded *Miller* was inherently substantive as it implicated a line of precedent concerned with the proportionality of certain punishments.[28] In light of *Miller* recognizing the grave risks of exposing a defendant to a "punishment that the law cannot impose," this Court held retroactive application was warranted. *See id.* at 735 ("There are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show the he falls within the category of persons whom the law may no longer punish... [] *See*, *e.g.*, *Atkins*… Those procedural requirements do not, of course, transform substantive rules into procedural ones.") (internal citation omitted).

As illustrated by *Miller* and *Montgomery*, the "[p]rotection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and *goes far beyond the manner of determining a defendant's sentence*." *Id.* at 733. (emphasis added); *Contra Phillips v. State*, 299 So 3d at 1021 ("[*Hall*] *merely clarified the manner* in which courts are to determine whether a capital defendant is intellectually disabled…") (emphasis added). Under this Court's jurisprudence, it follows that the same logic applies to ID claims. Given that *Hall*, like *Miller*, contains a procedural component, and is ultimately rooted in the Eighth

[28] *See id.* at 732, "The 'foundation stone' for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles. Those cases include *Graham v. Florida*, *supra*, which held the Eighth Amendment bars life without parole for juvenile nonhomicide offenders, and *Roper v. Simmons*, which held the Eighth Amendment prohibits capital punishment for those under the age of 18 at the time of their crimes." (internal citations omitted).

Amendment's prohibition against imposing a particular sentence on a class of offenders, the procedures imposed by Florida courts cannot impede the enforcement of the substantive constitutional rule announced in *Atkins*. Thus, the procedures used to determine ID must allow for the consideration of other evidence, beyond IQ scores, to enable a court to resolve the question of whether an offender is, or is not, a member of the eligible class. *See e.g., Moore* I at 1051. ("Mild levels of intellectual disability… nevertheless remain intellectual disabilities").

Hall v. Florida undeniably mandated the expansion of *Atkins* claims under Florida law to reduce the risk of executing an ID offender. While *Atkins* announced a categorical rule forcing the sentencer to consider ID before determining the permissibility of a death sentence, *Hall* built upon *Atkins* framework and forced Florida to broaden the class of qualifying ID individuals. Consequently, retroactivity is necessarily invoked as the Constitution deprives States of the power to impose a death sentence when a rule has altered the class of persons that the law may punish. Despite the *Walls* court identifying and understanding this principle, the Florida Supreme Court here determined that Phillips should not have expected to receive the same "benefits" from *Hall v. Florida* as other similarly situated capital defendants on collateral review received. In providing no notice nor affording Phillips the opportunity to challenge the court's contemplated retreat from *Walls*, it can hardly be said that the court's abrogation of a state-created right comports with due process.

"Once a State has granted prisoners a liberty interest, this Court [has] held that due process protections are necessary 'to insure that the state-created right is

not arbitrarily abrogated.'" *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980). Who gets the benefit of a substantive right and who does not must not offend the Due Process Clause. Yet the Florida Supreme Court's analysis here fails to address the due process implications of its *sua sponte* reversal. Instead, the court maintains *Hall* should have had a "limited practical effect on the administration of the death penalty in our state," and concludes the State has a "weighty interest in not having Phillips" litigate his ID claim. Accordingly, not only has the court refused to play by its own rules, it has created rules advantageous only to the State while depriving Phillips of a fair opportunity to show that the Constitution prohibits his execution under the Eighth Amendment.[29] *Phillips v. State*, 299 So. 3d at 1023-24.

2. This Court Should Hold That The Florida Supreme Court's Arbitrary *Sua Sponte* Reversal Of Settled Precedent Creates An Unacceptable Risk That Intellectually Disabled Individuals Will Be Executed in Violation of the Eighth And Fourteenth Amendments.

"[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring); *see also id.* at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"). The death penalty may not be "inflicted in

[29] In light of this Court's previous rejection of the State's assertion that the *Walls* court misinterpreted this Court's understanding of ID as articulated in *Hall v. Florida* and *Brumfield v. Cain*, 136 S. Ct. 2269 (2015), the Florida Supreme Court's failure to act as a neutral arbiter independent of the State is all the more apparent. *See State of Florida v. Walls,* Case No. 16-1518, Petition for Writ of Certiorari, May 10, 2017.

an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); see also *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

Other Florida inmates, challenging their sentences on collateral review, have been resentenced to life imprisonment based on *Hall and Walls.* Accordingly, there is no non-arbitrary rational basis that justifies Phillips being denied the same benefit. Moreover, the court's actions here resemble the very actions condemned by this Court in *Hall v. Florida*. In *Hall*, the issue of ID first appeared in 1992 when Mr. Hall's resentencing judge found that he had been "mentally retarded all of his life." *Hall v. State*, 614 So. 2d 473 (Fla. 1993). After *Atkins* and *Cherry*, however, Mr. Hall was forced to prove his ID yet again, except under a different standard—a much harder standard to meet—as this Court recognized in *Hall v. Florida*. Likewise, here, the Florida Supreme Court first recognized Phillips's potential ID diagnosis in 1992 when it reversed for a new sentencing phase. As the 1992 opinion reflects, all "experts agreed that Phillips' intellectual functioning is at least low average and **possibly borderline retarded**." And in 2004, the court again noted that "each [expert] also testified that **Phillips was borderline mentally retarded**." In fact, like in *Hall*, the only time the court determined that Phillips's record of low IQ scores and documented adaptive deficits did not satisfy Florida's definition of ID was in 2008—following the enactment of Fla. R. Crim. Pro. 3.203—and following the court's own interpretation of ID as articulated in *Cherry*.

In 2016, when the Florida Supreme Court finally accepted Mr. Hall's ID diagnosis and ineligibility for a death sentence, the court noted the various scores which he had obtained over the years: 80 on the WAIS-R (1986); 74 on the WAIS-III (1995); 71 on the WAIS-III (2002); and 72 on the WAIS-IV (2008). Despite the fact that none of the scores reflected a score of 70 or below, the court concluded these scores did not preclude a finding of ID: "when determining the eligibility for the death penalty of a defendant who has an IQ test score approaching 70, Florida courts may not bar the consideration of other evidence of deficits in intellectual and adaptive functioning." *Hall,* 201 So. 3d at 634-35. Here, not only are Phillips's scores in line with—and even lower—than some of those at issue in *Hall*, the Florida Supreme Court clearly denied his *Atkins* claim by reverting to its pre-*Hall* framework. Since the court's 2008 opinion found that Phillips failed to establish prong 1, the court determined that no other evidence of his *Atkins* claim would now be considered, contrary to this Court's command in *Hall*.

Furthermore, in *Hall v. State*, the Florida Supreme Court finally acknowledged the difficulties of determining the existence of adaptive deficits in situations where an individual had spent the majority of his life in prison. *Id.* at 638 (given that Hall committed the murder in 1978 at the "age of thirty-two and has been incarcerated ever since… it would be illogical to preclude a retrospective analysis of Halls adaptive deficits at the time of the murder. The prohibition against executing the intellectually disabled, is based, in part, on their culpability at the time the crimes were committed."). The court's opinion then went on to chastise the lower court for

giving the 2008 *Phillips v. State* opinion too narrow of a reading. *But see*, *Phillips v. State*, 984 So. 2d at 511 (rejecting the credibility of defense expert, Dr. Keyes, because his adaptive functioning assessment focused on Phillips's functioning *prior to incarceration* whereas the State expert gave the ABAS to six prison officials). Accordingly, the court's attempt to distinguish *Hall* and *Phillips* is disingenuous at best. While Hall entered the prison system at 32, Phillips entered Florida's adult prison system at the age of 16. And following his entrance into the system, he only spent approximately three years of his adult life outside of those structured walls. Despite this, as well as decades of records reflecting his low IQ and inability to adapt, both the circuit court and the Florida Supreme Court have refused to properly assess his *Atkins* claim.

In evaluating whether Phillips established ID, the 2018 circuit court acknowledged the law mandating an interdependent holistic evaluation of all three prongs in light of *Hall* and *Moore* I. Notwithstanding this recognition, the circuit court opted to scour the record for adaptive strengths to refute prong 2. As this Court has indicated, a proper assessment of this prong requires focusing on the defendant's deficits in adaptive functioning, not his strengths. *Compare* PCR-18. 289-90 (Phillips "knew how to drive, had two jobs as a dishwasher and a job as a short order cook." The 'alibi notes' are also "indicative of highly adaptive behavior" as they establish "planning, execution and subsequent cover-up of the murder." Phillips is not easily manipulated, as "he remained silent" after being arrested, "he did not give any statements to the police.") *with Moore* I at 1047 ("Moore had demonstrated adaptive

strengths… by living on the streets, playing pool and mowing lawns for money, committing the crime in a sophisticated way and then fleeing, testifying and representing himself at trial, and developing skills in prison. Those strengths, the court reasoned, undercut the significance of Moore's adaptive limitations.") (internal citations omitted).

This Court rejected the Texas court's reliance on "Moore's record of academic failure, along with the childhood abuse and suffering he endured," as detracting from a diagnosis of ID. *Moore*, 137 S.Ct. at 1051. This Court also noted that such an analysis is inconsistent with the medical community, which views childhood academic failures and trauma as "risk factor for intellectual disability." *Id.* In other words, both the circuit court and the Florida Supreme Court should have looked to those behaviors from Phillips's childhood as "factors [] to explore the prospect of intellectual disability further" rather than as reasons "to counter the case for a disability determination." *See also, Moore v. Texas,* 139 S. Ct. 666, 671 (2019) (*Moore* II) (noting that Texas court had again "departed from clinical practice" by requiring Moore to prove that his "problems in kindergarten" stemmed from his intellectual disability rather than "emotional problems"). Given that the circuit court found that Phillips established prong 3 based on his record of academic failure, the court's failure to conduct a holistic evaluation and consider his documented history of low IQ scores and evidence of adaptive deficits in tandem, ignores the mandates of *Hall v. Florida*. Had the court properly considered the risk factors for ID—which prior orders and opinions labeled as "mitigating factors," *i.e.*, that Phillips was born in a migrant labor

camp, grew up impoverished, unsupervised, physically abused, suffered from emotional deficiencies, and was incapable of adapting or learning from past experiences—the deficits would have been evident. Phillips's adaptive deficits, when properly evaluated under prevailing clinical and medical standards, have long been established. The circuit court's improper focus on stereotypes and adaptive strengths along with the Florida Supreme Court's refusal to address the adaptive functioning prong, departs from established medical practice as well as this Court's commands in *Hall* and *Moore*.

3. The Florida Supreme Court's Refusal to Apply the Constitutionally Valid Pre-*Cherry* Statute to Phillips Violates the Ex Post facto Clause.

The Florida Supreme Court's decision to deny Phillips the retroactive effect of a constitutionally valid statute is impermissibly retroactive in violation of *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *Marks v. United States*, 430 U.S. 188 (1977). See also *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-92 (1965); *Cole v. Arkansas*, 333 U.S. 196 (1948). Just as he was entitled to the pre-*Cherry* reading of the statute then, he is entitled to it now. It is a commonplace of ex post facto history that the prohibition was a response to punishments exacted in England when one warring faction succeeded another and proceeded to despoil the losers. See *Calder v. Bull*, 3 U.S. 386, 390 (1798) (opinion of Chase, J.). Protection against retroactive punishment resulting from regime change was very much in the mind of the Framers when they included two ex post facto clauses in the federal Constitution. See *Cummings v. Missouri*, 71 U.S. 277, 322 (1866). To deprive Phillips of the benefits of a rule that as recently as 2017 was squarely held to be applicable to his case violates

Article I, § 10 of the federal Constitution. See *State v. Ramseur*, 843 S.E.2d 106, 113-19 (N.C. 2020).

As this Court has pointed out in finding that a change in State evidentiary standards violated the ex post facto clause, "[t]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell v. Texas*, 529 U.S. 513, 533 (2000).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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