NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM LEE THOMPSON,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

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

CAPITAL CASE

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October 21, 2022

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APPENDIX A

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MIAMI-DADE COUNTY

THE STATE OF FLORIDA,
Plaintiff,

vs.

WILLIAM LEE THOMPSON,
Defendant
_____/

CRIMINAL DIVISION
CASE NO.: F76-3350B

JUDGE TINKLER MENDEZ

ORDER DENYING SEVENTH MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE AND GRANTING STATE'S MOTION FOR RECONSIDERATION

THIS CAUSE having come before the court on the State 's Motion for Reconsideration and the Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence dated May 26, 2015, the court finds as follows:

On May 26, 2015, the Defendant filed a seventh motion for post-conviction relief. The Defendant argued that based on the cases of *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) and *Hall v. Florida,* - U.S.-, 134 S.Ct. 1986, 1990, 188 L.Ed.2d 1007 (2014), he was entitled to a new evidentiary hearing on the issue of intellectual disability. This court disagreed, and summarily denied the motion.[1] On November 10, 2016, the Supreme Court of Florida reversed and remanded the case for a new evidentiary hearing on intellectual disability that conformed to the United States Supreme Court's holding in *Hall. Thompson v. State,* 208 So.3d 49.

[1] A predecessor Judge had conducted a full evidentiary hearing on Mr. Thompson's claim, and entered a written order denying his intellectual disability claim. This Court's later summary denial was based on this prior determination and further articulation based on the record of that hearing, that even retroactively applying the decision in *Hall,* Mr. Thompson failed to establish his claim by sufficient evidence.

Since remand, this court has been trying to conduct the evidentiary hearing. In this time, counsel for the Defendant, Mr. Thompson, filed various pleadings and other claims with the Supreme Court of Florida, both related and unrelated to his intellectual disability claims. First, Defendant filed SC17-2127 on December 6, 2017, seeking emergency review of a nonfinal order. That case was voluntarily dismissed two days later. Then, Defendant filed SC18-1435 where he appealed the denial of his *Hurst* motion. The Supreme Court of Florida affirmed.

Defendant also filed a Petition for Writ of Prohibition in Case number SC18-1395 seeking to preclude the State's expert from testing the Defendant unless they were permitted to video the interview/testing. The Supreme Court of Florida issued a stay of lower court proceedings on August 27, 2018. On November 28, 2018, the Supreme Court of Florida denied the writ finding that this Court did not depart form the essential requirements of law in denying the Defense request. The Defendant filed a motion for rehearing, which was denied. The Supreme Court of Florida then granted a motion for clarification which allowed the defense expert the opportunity to watch and listen to the evaluation of the Defendant from another room. As the parties engaged in scheduling the evaluation, this court then tentatively scheduled the hearing for January 2019. Unfortunately, Defense counsel had an unforeseen family illness, and, in deference to defense counsel, the hearing was not held as scheduled, but deferred to a later time to allow defense counsel the opportunity to deal with the personal matter.

Thereafter, the parties worked for several months attempting to schedule the State's expert testing of Mr. Thompson. The parties also worked to schedule the depositions of the other experts listed. The attorneys continued to request additional time to prepare for the new evidentiary hearing.

Just several months ago, the Supreme Court of Florida decided *State v. Phillips,* 2020 WL 2563476 (Fla. 2020). In *Phillips* the Supreme Court stated:

> We cannot escape the conclusion that this Court in *Walls* clearly erred in concluding that *Hall* applies retroactively. We say that based on our review of *Hall,* our state's judicial precedents regarding retroactivity, and the decisions of federal habeas courts concluding that *Hall* does not apply retroactively. Based on its incorrect legal analysis, this Court used *Hall-which* merely created a limited practical effect on the administration of the death penalty in our state-to undermine the finality of numerous criminal judgments. As in *Poole,* "[u]nder these circumstances, it would be unreasonable for us *not* to recede from [Walls] erroneous holdings." *Id at --, at S48.*

The Supreme Court of Florida then concluded in *Phillips:* "Thus, we conclude that we should not continue to apply the erroneous reasoning of *Walls.* And because *Hall* does not apply retroactively, it does not entitle Phillips to a reconsideration of whether he meets the first prong of the intellectual disability standard."

After the Supreme Court of Florida released the *Phillips* opinion, the State filed a Motion to Reconsider, asking this Court to reconsider the necessity of an evidentiary hearing and to summarily deny the Defendant's Seventh Motion for Postconviction Relief. The Defendant responded to the State's Motion. In the response, the Defense relied upon *Croft v. State*, 295 So.3d 307(Fla 2d DCA 2020) and *Wittemen v. State*, 2020 WL 4909618 (Fla. 2d DCA 2020). These cases are factually distinguishable. The Defense also argued that this court should wait until the Supreme Court of Florida issues an opinion in *State v. Okafor*, SC20-323. Additionally, the Defense argues that *Phillips* is not a change of the law and cannot overrule the U.S. Supreme Court opinion in *Hall.* The Defense is correct about that. *Phillips* overrules *Walls*, which held that *Hall* was retroactive. Finally, the Defense argues that it would be a manifest injustice to denying Mr. Thompson his opportunity to have a full evidentiary hearing on the issue addressing his claim of

intellectual disability to allow a holistic assessment of his claim using appropriate clinical definitions and constitutional standards. In this regard, however, this Court believes that Mr. Thompson has had the full, comprehensive evidentiary review of his claim before a predecessor Judge, and, thereafter, by this Court, who relied on the entire record and transcript of the prior proceeding, heard additional witness testimony and additional argument and assessed Mr. Thompson's intellectual disability claim under the requisite legal and constitutional standard.

This Court has the utmost respect for our Supreme Court of Florida and would not willfully violate a mandate. However, this matter was remanded for an evidentiary hearing based upon the decision in *Walls* that *Hall* was retroactive. As was recently determined, *Walls* is no longer good law. The Supreme Court of Florida reiterated, in *Cave v. State,* 2020 WL 3088799 (Fla. 2020), that *Walls* was **erroneously decided.** The Supreme Court stated that in *Cave* that " ... [C]ave is not entitled to postconviction relief based on his intellectual disability claim. As this Court stated in *Phillips v. State,... Hall* does not apply retroactively. Accordingly, we affirm the postconviction court's summary denial of Cave's intellectual disability claim."

This change of law was also recently reiterated in *Lawrence v. State,* 2020 WL3088793 (Fla. 2020). As the Court found "[I]n 2018, Lawrence filed a second successive postconviction motion claiming that he is intellectually disabled. We conclude that Lawrence's argument lacks merit. As this Court stated in Phillips *v. State,* 45 Fla. L. Weekly S163, Sl65-67, --- So. 3d ----,----------, 2020 WL 2569713 (Fla. May 21, 2020), *Hall v. Florida,* 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), does not apply retroactively. Therefore, Lawrence is not entitled to relief."

A few weeks ago, on August 13, 2020, the Supreme Court of Florida decided *Freeman v. State,* 2020 WL 4691639. The Court again stated that it has receded from *Walls* and that *Phillips* is the applicable law.

This court must follow the current law. Under the current law, Defendant Thompson is not entitled to relief. Again, this Court's finding and order is not to be interpreted as a lack of respect for the November 2016 order entered by the Florida Supreme Court. To the contrary, this Court believes that it is proper to follow the existing law enunciated in *Phillips*--- that *Walls* was erroneously decided, and that the *Hall* decision is not to be applied retroactively to intellectually disability claims. If this court has now erroneously interpreted the intent of the Supreme Court of Florida, it will certainly proceed to follow the Court's directive following any appeal of this order.[2] In the alternative, should *Okafor* be decided while the appeal in this matter is pending, and if the Florida Supreme Court holds that that the trial court cannot ignore a mandate, the parties could also file a motion to relinquish jurisdiction and this court would proceed to conduct another evidentiary hearing on Mr. Thompson's intellectual disability claim.

[2] Again, Defendant Thompson had a full and complete evidentiary hearing. He presented evidence on all three prongs. See Judge Scola's order attached as an exhibit to the State's Motion for Reconsideration. The Florida Supreme Court agreed. *Thompson v. State,* 41 So.3d 219 (Fla. 2010).

WHEREFORE, it is **ORDERED AND ADJUDGED** that Defendant's Successive Motion for Postconviction Relief is **DENIED**. It is **FURTHER ORDERED AND ADJUDGED** that the State's Motion for Reconsideration is **GRANTED.**

Defendant has 30 days to appeal this order.

DONE AND ORDERED in Miami-Dade County, Florida, on this 2nd day of October, 2020.

Marisa Tinkler Mendez
Circuit Court Judge

Copies to:
Marie-Louise Samuels Parmer, counsel for Defendant
Brittney Nicole Lacy, counsel for Defendant
Michael Chance Meyer, counsel for Defendant
Rhonda Giger, counsel for Defendant
Jonathon Borst, ASA
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APPENDIX B

341 So.3d 303
Supreme Court of Florida.

William Lee THOMPSON, Appellant,
v.
STATE of Florida, Appellee.

No. SC20-1847

March 31, 2022

Synopsis

Background: Following affirmance of conviction for first-degree murder and sentence of death on direct appeal, 389 So.2d 197, affirmance of denial of his first motion for postconviction relief, 410 So.2d 500, vacation of death sentence and remand for resentencing on his second motion for postconviction relief, 515 So.2d 173, and affirmance of subsequent imposition of death penalty on remand, 619 So.2d 261, movant again sought postconviction relief, asserting that he had intellectual disability and was thus ineligible for death penalty. The Circuit Court, Miami–Dade County, Marisa Tinkler–Mendez, J., 2015 WL 13811482, summarily denied motion. Movant appealed. The Supreme Court, 208 So. 3d 49, reversed and remanded for evidentiary hearing. On remand, the Circuit Court, Tinkler–Mendez, J., denied motion without holding hearing. Movant appealed.

The Supreme Court held that law-of-the-case doctrine's exception for intervening change of controlling law applied to Supreme Court's ruling that United States Supreme Court's decision in *Hall v. Florida*, 134 S.Ct. 1986, which rejected state's rigid IQ score cutoff of 70 for intellectual-disability challenges to imposition of death penalty, applied retroactively to movant's case.

Affirmed.

Labarga, J., filed dissenting opinion.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

An Appeal from the Circuit Court in and for Miami-Dade County, Marisa Tinkler-Mendez, Judge, Case No. 131976CF003350B000XX

Attorneys and Law Firms

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Ashley Moody, Attorney General, Tallahassee, Florida, and Jennifer A. Davis, Assistant Attorney General, Miami, Florida, for Appellee

Opinion

PER CURIAM.

***304** William Lee Thompson—a prisoner under sentence of death—appeals the trial court's summary denial of his seventh motion for postconviction relief, filed under Florida Rule of Criminal Procedure 3.851. [1] We affirm.

I. Background

In 1976, police arrested Thompson for his involvement in Sally Ivester's death. We have described the facts surrounding her death as follows:

> Thompson, Rocco Surace, Barbara Savage, and the victim Sally Ivester were staying in a motel room. The girls were instructed to contact their homes to obtain money. The victim received only $25 after telling the others that she thought she could get $200 or $300. Both men became furious. Surace ordered the victim into the bedroom, where he took off his chain belt and began hitting her in the face. Surace then forced her to undress, after which ... Thompson began to strike her with the chain. Both men continued to beat and torture the victim. They rammed a chair leg into the victim's vagina, tearing the inner wall and causing internal bleeding. They repeated the process with a night stick. The victim was tortured with lit

> cigarettes and lighters, and was forced to eat her sanitary napkin and lick spilt beer off the floor. This was followed by further severe beatings with the chain, club, and chair leg. The beatings were interrupted only when the victim was taken to a phone booth, where she was instructed to call her mother and request additional funds. After the call, the men resumed battering the victim in the motel room. The victim died as a result of internal bleeding and multiple injuries.

Thompson v. State, 389 So. 2d 197, 198 (Fla. 1980).

The State charged Thompson with first-degree murder and other crimes. After undergoing several psychiatric evaluations, [2] Thompson pled guilty to each of the charged offenses. Following the penalty phase, the jury recommended a sentence of death, and the trial court accepted that recommendation. On direct appeal, we reversed Thompson's convictions and sentences and remanded his case to the trial court. *Thompson v. State*, 351 So. 2d 701, 701 (Fla. 1977).

Upon remand, Thompson again pled guilty to each offense and received a death sentence for Ivester's murder. We affirmed on direct appeal. *Thompson*, 389 So. 2d at 198. However, we later granted Thompson a new penalty phase because his "death sentence was imposed in violation of *Lockett* [*v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)], and in violation of ... *Hitchcock* [*v. Dugger*, 481 U.S. 393,393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)]." *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987). On remand, the trial court again sentenced Thompson to death, and we affirmed. *Thompson v. State*, 619 So. 2d 261, 264, 267 (Fla. 1993). His death sentence became final in 1993.

Since then, Thompson has sought postconviction relief in both state and federal courts, claiming—among other things—that he has an intellectual disability and is thus ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). We now detail ***305** some of the prior proceedings in state court and developments in relevant case law.

Thompson's first three postconviction motions were summarily denied. Each time, we reversed. In reversing the summary denial of the third postconviction motion, we ordered the trial court to conduct an evidentiary hearing based on the standard set forth in *Cherry v. State,* 959 So. 2d 702 (Fla. 2007). [3] *Thompson v. State*, 3 So. 3d 1237, 1238-39 (Fla. 2009). The trial court held the hearing as ordered and ultimately denied relief, finding that Thompson failed to establish the first prong of the *Cherry* test, *i.e.*, "an IQ of 70 or less." We affirmed that ruling on appeal. *Thompson v. State*, 41 So. 3d 219 (Fla. 2010) (table decision).

Seven years later, the United States Supreme Court rejected *Cherry*'s rigid IQ score cutoff, holding that it "create[d] an unacceptable risk that persons with intellectual disability will be executed" in violation of the Eighth Amendment to the United States Constitution. *Hall v. Florida*, 572 U.S. 701, 704, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014). Thereafter, Thompson filed another motion for postconviction relief, arguing that *Hall* applied retroactively to his case. The trial court summarily denied the motion, and Thompson appealed. Relying on *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016), we held that *Hall* applied retroactively to Thompson's case. *Thompson v. State*, 208 So. 3d 49, 50 (Fla. 2016). Thus, we reversed the summary denial and remanded for an evidentiary hearing. *Id.*

Over the next five years, Thompson and the State litigated various issues related to the *Hall* hearing. While such litigation was ongoing, we receded from *Walls*. *See Phillips v. State*, 299 So. 3d 1013 (Fla. 2020) (finding that *Hall* did not apply retroactively and receding from *Walls*'s contrary holding). The State then filed a motion in the trial court arguing that *Phillips* constituted an intervening change in law, which eliminated the need for a new hearing. Agreeing with the State, the trial court denied Thompson's intellectual-disability claim without holding a hearing. [4]

This appeal follows.

II. Analysis

Thompson argues that our decision in *State v. Okafor*, 306 So. 3d 930, 933 (Fla. 2020), required the trial court to conduct a *Hall* hearing pursuant to our mandate, regardless of the intervening change of law brought about by *Phillips*. According to Thompson, the trial court's failure to conduct such a hearing constituted reversible error. [5] Thompson reads *Okafor* too broadly.

In *Okafor*, we rejected the State's request to reinstate Okafor's death sentence three years after it was vacated pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *Okafor*, 306 So. 3d at 933-35; *see also Okafor v. State*, 225 So. 3d 768, 775 (Fla. 2017) (vacating Okafor's death sentence). ***306** We stressed that our prior judgment vacating the death sentence wiped the slate clean as to that sentence, rendering it a nullity. *Okafor*, 306 So. 3d at 933. Thus, Okafor was a convicted capital defendant without a sentence. We also emphasized that the time for altering our judgment had long since passed. *Okafor*, 306 So. 3d at 933-34. Under these unique circumstances, "there [were] no available legal means" "to undo [the] final judgment vacating Okafor's death sentence." *Id.* at 934.

Okafor, however, is not controlling here because our judgment ordering a new *Hall* hearing did not vacate Thompson's death sentence. Accordingly, in contrast with Okafor's nullified death sentence, Thompson's death sentence remains fully intact—and has been so since becoming final in 1993. *See Hanks v. State*, 327 So. 3d 940, 943 (Fla. 1st DCA 2021) (distinguishing *Okafor* where the noncapital defendant's sentence remained intact).

Finding *Okafor* inapplicable to this case, we turn to the law of the case doctrine. That doctrine "requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001). However, we have recognized exceptions to the doctrine, including where there has been an intervening change of controlling law. *Wagner v. Baron*, 64 So. 2d 267, 268 (Fla. 1953) (noting that the law of the case doctrine "must give way where there has been a change in the fundamental controlling legal principles").

Such a change occurred when we decided in *Phillips* that *Hall* did not warrant retroactive application. Notably, in *Nixon v. State*, 327 So. 3d 780 (Fla. 2021), we declined to review the merits of a ruling denying a *Hall*-based intellectual disability challenge, reasoning:

> It is true that—when *Walls* was still good law—this Court instructed the trial court to determine whether an evidentiary hearing was necessary to evaluate Nixon's successive intellectual disability claim in light of *Hall*. But under *Phillips*, the controlling law in our Court now is that *Hall* does not apply retroactively. It would be inconsistent with that controlling law for us to entertain Nixon's successive, *Hall*-based challenge to the trial court's order here.

Id. at 783.

Nixon's rationale applies here. Since Thompson's death sentence was final in 1993, *Phillips* precludes application of *Hall* in this case. Thus, Thompson could not succeed on his *Hall*-based intellectual disability claim. As a consequence, the trial court did not err in summarily denying that claim. [6]

III. Conclusion

Based on our analysis above, we affirm the trial court's order summarily denying Thompson's seventh motion for postconviction relief.

It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

LABARGA, J., dissents with an opinion.

LABARGA, J., dissenting.

In light of my dissent in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020) (receding from *Walls v. State*, 213 So. 3d 340 (Fla. 2016), and holding that ***307** *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), does not apply retroactively), I dissent to the majority's decision affirming the summary denial of Thompson's seventh motion for postconviction relief.

All Citations

341 So.3d 303, 47 Fla. L. Weekly S99

Footnotes

1 We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

2 The results of each evaluation showed that Thompson was competent to proceed.

3 *See Cherry*, 959 So. 2d at 711 (interpreting section 921.137(1), Florida Statutes (2002), as requiring a defendant seeking to establish an intellectual disability claim to prove that (1) "he has significantly subaverage general intellectual functioning," an IQ of 70 or less, (2) "significantly subaverage general intellectual functioning ... with deficits in adaptive behavior," and (3) manifestation of subaverage intellectual functioning and deficits prior to age eighteen).

4 The trial court did not address Thompson's argument challenging this Court's holding in *Phillips*.

5 We review the trial court's summary denial of Thompson's postconviction motion de novo. *Rogers v. State*, 327 So. 3d 784, 787 n.5 (Fla. 2021).

6 To the extent Thompson asks us to revisit our holding in *Phillips*, we decline to do so. *See, e.g.*, *Nixon*, 327 So. 3d at 783; *Freeman v. State*, 300 So. 3d 591, 594 (Fla. 2020); *Cave v. State*, 299 So. 3d 352, 353 (Fla. 2020).

APPENDIX C

341 So.3d 307 (Mem)
Supreme Court of Florida.

William Lee THOMPSON, Appellant(s)
v.
STATE of Florida, Appellee(s)

Case No.: SC20-1847

JUNE 23, 2022

Lower Tribunal No(s).: 131976CF003350B000XX

Opinion

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

LABARGA, J., concurs with an opinion.

LABARGA, J., concurring.

I continue to adhere to my dissent in *Thompson v. State*, 341 So.3d 303 (Fla. Mar. 31, 2022), wherein I reaffirmed my dissenting view in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), and my belief that *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), applies retroactively.

However, I agree that Thompson has not established a basis for rehearing, and consequently, I have voted to deny rehearing.

All Citations

341 So.3d 307 (Mem), 47 Fla. L. Weekly S165

APPENDIX D

208 So.3d 49
Supreme Court of Florida.

William THOMPSON, Appellant,
v.
STATE of Florida, Appellee.

No. SC15–1752.
|
Nov. 10, 2016.

Synopsis

Background: Following reversal of his conviction by guilty plea for first degree murder by guilty plea on direct appeal, 351 So.2d 701, affirmance following remand of his conviction by guilty plea for first degree murder and sentence of death on direct appeal, 389 So.2d 197, affirmance of denial of his first motion for postconviction relief, 410 So.2d 500, vacation of death sentence and remand for resentencing on his second motion for postconviction relief, 515 So.2d 173, affirmance of subsequent imposition of death penalty on remand, 619 So.2d 261, and affirmance of denial of his third motion for postconviction relief, 759 So.2d 650, reversal of summary denial of his fourth motion for postconviction relief, and affirmance of denial of his fifth motion for postconviction relief, 41 So.3d 219, defendant filed motion for postconviction relief. The Circuit Court, Miami Dade County, Marisa Tinkler Mendez, J., denied motion. Defendant appealed.

The Supreme Court held that remand was warranted for new hearing on intellectual disability claim that was denied based on bright-line test of whether defendant's intelligence quotient (IQ) was 70 or below.

Lewis, J., concurred in the result.

Canady, J., dissented with opinion.

Attorneys and Law Firms

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Pamela Jo Bondi, Attorney General, Tallahassee, FL; and Marilyn Muir Beccue, Assistant Attorney General, Tampa, FL, for Appellee.

Opinion

PER CURIAM.

William Lee Thompson was convicted of first-degree murder and sentenced to death for a 1976 murder. His sentence became final in 1993. Since the United States Supreme Court held that it was unconstitutional to execute persons with intellectual disabilities in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), Thompson has timely raised claims that he is intellectually disabled ***50** and cannot be executed. In denying Thompson relief, as more fully explained, the trial court and this Court relied on *Cherry v. State,* 959 So.2d 702, 712 14 (Fla.2007), which held that if a defendant could not establish an IQ score of 70 or below, then his intellectual disability claim should be denied without consideration of the other prongs of the intellectual disability test. In *Hall v. Florida,* U.S. , 134 S.Ct. 1986, 1990, 188 L.Ed.2d 1007 (2014), the United States Supreme Court held that Florida's strict bright-line cutoff of 70 for IQ scores with respect to the first prong of the intellectual disability test "creates an unacceptable risk that persons with intellectual disabilities will be executed" in violation of *Atkins* and is, therefore, unconstitutional. *Hall* specifically disapproved of the bright-line cutoff of 70 for IQ scores stated by this Court in *Cherry. Id.* at 2000.

Although Thompson has had a broad range of IQ scores over his lifetime, he received several IQ scores below 75, and in 2009 the defense expert tested him with a score of 71. In reviewing the history of this case, it is clear that Thompson did not receive the type of "conjunctive and interrelated assessment" that *Hall* requires, as more recently set forth in *Oats v. State,* 181 So.3d 457, 460 (Fla.2015). As this Court stated in *Oats, Hall* did not just require that courts consider the statistical error margin in determining IQ, it also changed the manner in which intellectual disability evidence must be considered: "courts must consider all three prongs in determining an intellectual disability, as opposed to relying on just one factor as dispositive ... because these factors are interdependent, if one of the prongs is relatively less strong, a finding of intellectual disability may still be

warranted based on the strength of other prongs." 181 So.3d at 467–68. This Court's recent opinion on remand in *Hall v. State,* 41 Fla. L. Weekly S372, 201 So.3d 628, 2016 WL 4697766 (Fla. Sept. 8, 2016), reaches the same conclusion in granting relief.

Because the trial court and this Court relied, in part, on the now invalid bright-line cutoff of an IQ score of 70 in denying Thompson relief, we have determined that Thompson should receive the benefit of *Hall.* Not only have we determined that *Hall* is retroactive utilizing a *Witt*[2] analysis, *Walls v. State,* 2016 WL 6137287 (Fla. Oct. 20, 2016), but to fail to give Thompson the benefit of *Hall,* which disapproved of *Cherry,* would result in a manifest injustice, which is an exception to the law of the case doctrine. *See State v. Owen,* 696 So.2d 715, 720 (Fla.1997) ("[t]his Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case" and that "[a]n intervening decision by a higher court is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case"). Because Thompson's eligibility or ineligibility for execution must be determined in accordance with the correct United States Supreme Court jurisprudence, this case is a prime example of preventing a manifest injustice if we did not apply *Hall* to Thompson. Accordingly, we reverse the summary order denying relief and remand ***51** to the trial court for a new evidentiary hearing on intellectual disability pursuant to the United States Supreme Court's holding in *Hall* and this Court's holding in *Oats.*[3]

FACTS AND PROCEDURAL HISTORY BEFORE *ATKINS*

Thompson pled guilty to the March 30, 1976, brutal beating death of the victim, Sally Ivester. *Thompson v. State,* 389 So.2d 197, 198 (Fla.1980). In *Thompson,* this Court described the crimes, which occurred when William Lee Thompson was 24 years old:

> The appellant Thompson, Rocco Surace, Barbara Savage, and the victim Sally Ivester were staying in a motel room. The girls were instructed to contact their homes to obtain money. The victim received only $25 after telling the others that she thought she could get $200 or $300. Both men became furious. Surace ordered the victim into the bedroom, where he took off his chain belt and began hitting her in the face. Surace then forced her to undress, after which the appellant Thompson began to strike her with the chain. Both men continued to beat and torture the victim. They rammed a chair leg into the victim's vagina, tearing the inner wall and causing internal bleeding. They repeated the process with a night stick. The victim was tortured with lit cigarettes and lighters, and was forced to eat her sanitary napkin and lick spilt beer off the floor. This was followed by further severe beatings with the chain, club, and chair leg. The beatings were interrupted only when the victim was taken to a phone booth, where she was instructed to call her mother and request additional funds. After the call, the men resumed battering the victim in the motel room. The victim died as a result of internal bleeding and multiple injuries. The murder had been witnessed by Barbara Savage, who apparently feared equivalent treatment had she tried to leave the motel room.

Id.

Thompson's mental condition has been an issue in both his circuit court proceedings and his appeals before this Court. On direct appeal, this Court allowed Thompson to withdraw his plea and remanded for further proceedings. *See Thompson v. State,* 351 So.2d 701 (Fla.1977). On remand, Thompson again pleaded guilty and again received a death sentence for the first-degree murder.[4] The convictions and death sentence

were affirmed by this Court. *See Thompson,* 389 So.2d at 200. In affirming the convictions and death sentence, this Court concluded in pertinent part that the trial court did not abuse its discretion in declining to order further psychiatric evaluations of Thompson "in view of the four previous reports and the failure of [Thompson]'s counsel to identify any particular circumstance that had caused the mental condition of [Thompson] to change since those prior examinations and the plea of guilty." *Id.* at 199. Subsequently, ***52** this Court affirmed the postconviction court's order denying relief on Thompson's first postconviction motion, in which Thompson claimed that his codefendant Surace was the dominant actor in the murder and that Surace's life sentence rendered the death sentence disproportionate. *See Thompson v. State,* 410 So.2d 500 (Fla.1982).[5] On appeal of the postconviction court's denial of his second postconviction motion, at which time Thompson also petitioned this Court for a writ of habeas corpus, this Court vacated the death sentence and remanded for resentencing because harmful error occurred when the jury was instructed that it could only consider statutory mitigation and Thompson was not permitted to present nonstatutory mitigation. *See Thompson v. Dugger,* 515 So.2d 173 (Fla.1987). Upon resentencing, the jury recommended death by a vote of seven to five, and the trial court again imposed the death penalty. *Thompson v. State,* 619 So.2d 261, 264 (Fla.1993). This Court affirmed. *Id.* at 267. Although Thompson's appeal from his 1989 resentencing did not present any issues related to his mental condition, this Court explained the mitigation evidence presented:

> Thompson presented numerous witnesses who testified in mitigation of his conviction, including a former church pastor, a church elder, a church member, an elementary school principal, and several family members. Thompson's former church pastor described Thompson as a slow learner and a follower who did not exhibit any violent or aggressive behavior. A church elder described Thompson as someone needing to be led, while the elder's wife described him as very faithful. *Testifying from school records, an elementary school principal stated that Thompson had an IQ of seventy-five, had been recommended for special educational placement, and had been a follower, not a leader.* Family members testified regarding the filthy home and affectionless environment in which Thompson had been raised. Thompson's ex-wife and mother of his two children described Thompson as a loving and gentle husband who was never physically violent or abusive. She also described Thompson as mentally slow and a follower and that their marriage failed partly because of his alcoholism.
>
> In an affidavit introduced by Thompson, Barbara Savage characterized the codefendant, Rocco Surace, as the gang-leader, who knew how to manipulate people. She described Thompson as a gullible and easygoing person, who was easily manipulated. However, Savage's characterization of Thompson as a person dominated by Surace was contradicted by her testimony at the original trial.
>
> A psychologist who examined Thompson stated that Thompson was a battered child and characterized him as an extremely depressed person. The psychologist stated that Thompson's IQ was at the lowest possible level of low-average intelligence. The psychologist also found Thompson to be brain-damaged and that his touch with reality was so loose and fragile that she could not tell whether Thompson was aware of what he was doing during the assault.
>
> A psychiatrist testified that he found Thompson to be retarded and easily led and threatened by Surace. He believed Thompson to have been brain-damaged ***53** since childhood, possibly since birth. He diagnosed Thompson as having organic brain disease and suffering from personality and stress disorders. A neurologist also testified that Thompson suffered from organic brain disease.
>
> In rebuttal, the State called the codefendant, Rocco Surace. Surace blamed Thompson for the attack on the victim, while acknowledging that he had entered guilty pleas to the same offense. A psychiatrist presented by the State testified that he had evaluated Thompson after the incident in 1976. He found that Thompson could process information and that his memory was intact. The psychologist concluded that Thompson suffered from an inadequate personality disorder and a long-standing pattern of antisocial and impulsive behavior.
>
> The State called another psychiatrist as an expert witness, who had seen Thompson in 1976, and, while he stated that "there was tremendous anger, rage, aggression, and diminished control with the involvement of alcohol and a number of drugs

> that were used," he did not feel that Thompson's conduct resulted from a mental disorder. He stated his belief that Thompson had the capacity to know what was right and what was wrong. A psychiatrist presented by the prosecution stated that he had examined Thompson in November of 1988 and had found no indication of organic brain disease or any serious deficiencies in Thompson's ability to reason, understand, or know right from wrong. He also stated that he did not believe that Thompson acted under the influence of extreme mental or emotional disturbance or that Thompson's capacity to appreciate the criminality of his conduct was substantially impaired. Furthermore, the psychiatrist stated that he did not believe Thompson acted under the substantial domination of another. Another psychologist presented by the State testified that Thompson had adequate communication skills and good general memory. He did not find Thompson to be overly susceptible to suggestion and found no evidence of major mental illness.

Id. at 263 64 (emphasis added).

Thompson then filed a third postconviction motion and appealed the summary denial of that motion to this Court, raising eighteen claims, along with a petition for habeas corpus raising thirty-six claims. *Thompson v. State,* 759 So.2d 650 (Fla.2000). In his appeal of the summary denial of his postconviction motion, Thompson alleged in pertinent part that he was incompetent to make a knowing, intelligent, and voluntary guilty plea and that he was not competent to be executed. *Id.* at 655 n. 4. In his habeas petition, he alleged in pertinent part that he was not competent when he pleaded guilty during his second trial, sentencing phase, and appeal, and that he was denied the assistance of mental health experts and counsel. *Id.* at 656 n. 5. This Court affirmed the summary denial of his third postconviction motion and denied the petition for habeas corpus. *Id.* at 667 68. Specifically, this Court concluded that Thompson's claim that he had been denied the assistance of mental health experts when he pleaded guilty was procedurally barred because this Court previously denied the exact claim. *Id.* at 657 n. 6. This Court also rejected Thompson's claims that his counsel was ineffective for failing to secure his right to the assistance of mental health professionals and that his appellate counsel was ineffective for failing to raise this issue on appeal. *Id.* at 665 66. As to Thompson's claim that he is not competent to be executed, this Court determined that the claim was not yet ripe for review. *Id.* at 667 n. 12.

54 PROCEDURAL HISTORY AFTER *ATKINS

After the United States Supreme Court rendered its decision in *Atkins,* Thompson filed a fourth postconviction motion to vacate his death sentence under *Atkins,* and our newly-adopted rule 3.203, on the ground that he is intellectually disabled and exempt from execution. *See* § 921.137, Fla. Stat. (2001); Fla. R.Crim. P. 3.203. The postconviction court determined that Thompson's claim was procedurally barred because the issue of intellectual disability was raised as mitigation and litigated in Thompson's 1989 resentencing proceeding.

On appeal, this Court concluded by order dated July 9, 2007, that this determination was in error because the evidence was presented for mitigation, not as evidence of intellectual disability as a bar to execution. *Thompson v. State,* Case No. SC05 279, 962 So.2d 340 (Fla. July 9, 2007). The order advised the trial court:

> [W]e reverse the trial court's summary denial and remand to the circuit court in order to allow Thompson to plead and prove the elements necessary to establish mental retardation, specifically including the threshold requirements set forth in *Cherry v. State,* 32 Fla. L. Weekly S151 [959 So.2d 702] (Fla. April 12, 2007). *See also,* section 921.137(1), Fla. Stat.; Fla. R.Crim. P. 3.203(c) & (e). Any motion filed in conformance with this Order shall be filed in the Circuit Court within thirty (30) days of the date of this Order. The trial court shall proceed in an expedited manner, and any evidentiary hearing must be held and an order entered within ninety (90) days of the date of this order. It is so ordered.

Id.

On August 8, 2007, Thompson filed his fifth postconviction motion, pursuant to this Court's July 2007 order. Thompson again raised the claim that *Atkins,* section 921.137, Florida Statutes, and Florida Rule of Criminal Procedure 3.203, prohibit Thompson's execution because he is intellectually disabled. [6] The postconviction court held a status conference on August 15, 2007, and then held a case management conference/Huff [7] hearing on August 22, 2007. At the *Huff* hearing, the State responded to Thompson's intellectual disability claims, arguing that because Thompson failed to plead the elements of his intellectual disability claim in accordance with *Cherry,* the claim should be summarily denied. On August 27, 2007, the postconviction court summarily denied Thompson's motion. Noting that *Cherry* defines intellectual disability as having an IQ below 70, the trial court concluded in pertinent part:

> The motion filed August 8, 2007, *does not allege his IQ is under 70.* To the contrary, the motion alleges his IQ is above 70 in numerous places. In paragraph 8 of the motion, Defendant states his IQ was 75 in 1958 and that his IQ was 74 when he was in the second grade. Both of these scores are above 70. In ***55** paragraph 10, Defendant states that Dr. Dorita Marina found his IQ to be in the low average range. Low average is above the range of mental retardation. Low average is not mentally retarded.
>
> > Even if Defendant's allegations are all taken as true, he does not allege the elements of mental retardation. He does not allege that his IQ is under 70, nor does he allege an onset before age 18, as his IQ was 75 in 1958 and 74 when the Defendant was in second grade. As he has not properly pled mental retardation, he is not entitled to a hearing under Fla. R.Crim. P. 3.203(e).
>
> (Emphasis in original).

On appeal, this Court remanded for an evidentiary hearing by order dated February 27, 2009. In its order, this Court instructed the postconviction court to consider the requirements set forth in *Cherry:*

> Having reviewed the record in this case, including all prior proceedings, we reverse and remand for an evidentiary hearing on Thompson's mental retardation claim. In making a determination of whether Thompson meets the requirements of mental retardation, the trial court shall consider the requirements set forth in *Cherry v. State,* 959 So.2d 702 (Fla.2007):
>
> > [The defendant] must establish that he has significantly subaverage general intellectual functioning. If significantly subaverage general intellectual functioning is established, [the defendant] must also establish that this significantly subaverage general intellectual functioning exists with deficits in adaptive behavior. Finally, he must establish that the significantly subaverage general intellectual functioning and deficits in adaptive behavior manifested before the age of eighteen.
>
> *Id.* at 711. We express no opinion on the merits of his claim of mental retardation.

Thompson v. State, 3 So.3d 1237, 1238 (Fla.2009). [8]

On remand, the circuit court held an evidentiary hearing on April 13, 2009, and April 27, 2009. Thompson called three witnesses: (1) William Weaver, Thompson's eighth-grade teacher, (2) Dr. Faye Sultan, a psychologist retained by Thompson to evaluate him for intellectual disability, and (3) Dr. Stephen Greenspan, a psychologist retained by Thompson to review the records of Thompson's mental testing, inform the court about proper procedures for evaluating intellectual disability, and testify regarding whether these procedures were followed in Thompson's case. The State called one witness: Dr. Greg Prichard, a psychologist retained by the State to evaluate Thompson for intellectual disability.

Weaver testified that Thompson struggled as a student, stating that Thompson was "the most academically challenged child I had." Weaver further testified that Thompson had difficulty performing school work, suffered from a speech impediment, had poor motor skills, and was clumsy. Weaver also reviewed Thompson's school records, which indicated IQ scores of 75 (1958), 74 (1959), 74 (1961), 79 (1963), 73 (1966), and 70 (1968). Weaver also testified that Thompson qualified as "educable mentally retarded," wanted to please, and was an absolute follower.

Dr. Faye Sultan, qualified as an expert in forensic psychology by the trial court, opined that Thompson was intellectually ***56** disabled. Dr. Sultan administered the WAIS IV IQ test on March 20, 2009, with four relevant sub-tests. Thompson scored 83 on verbal comprehension,

81 on perceptual reasoning, 77 on working memory, and 56 on processing speed. Based on these data, Dr. Sultan concluded that Thompson's full-scale IQ score fell in a range between 68 and 76 at a 95% confidence interval. The actual full-range IQ score calculated by Dr. Sultan was 71.

Dr. Sultan also evaluated Thompson's adaptive functioning by consulting school records and interviewing witnesses who knew Thompson before his incarceration, including Thompson's mother and wife. Based on this information, Dr. Sultan concluded that Thompson manifested adaptive behavior deficits, and that these deficits manifested before the age of 18. Dr. Sultan viewed these findings as support for her conclusion that Thompson was intellectually disabled.

The State then called its witness, Dr. Greg Prichard, who was qualified as an expert in forensic psychology. Dr. Prichard administered the Stanford Binet 5 IQ test[9] to Thompson on April 6, 2009, with five relevant sub-tests. Thompson scored 85 on fluid reasoning, 91 on knowledge, 86 on quantitative reasoning, 100 on visual-spatial, and 86 on working memory. Based on these data, Dr. Prichard calculated Thompson's non-verbal IQ as 86, verbal IQ as 91, and full-scale IQ as 88. After noting that this full-scale IQ is consistent with earlier IQ scores obtained by Thompson, [0] Dr. Prichard opined that Thompson was not intellectually disabled. Dr. Prichard did not perform a formal adaptive functioning evaluation, but based on "common-sense," his interactions with Thompson, and his review of Thompson's records, Dr. Prichard opined that Thompson's ability to enlist in the Marines, obtain his GED, and work as a security guard, cook, roofer, and truck driver is consistent with an absence of intellectual disability.

Dr. Prichard further opined that although there was no problem with the raw data obtained by Dr. Sultan, Dr. Sultan's diagnosis of intellectual disability was inappropriate, because Thompson's full-scale IQ score was only pulled down by a single outlying score on the processing speed sub-test. According to Dr. Prichard, this indicated a possible learning disability or attention deficit issue, not intellectual disability.

Finally, Thompson called Dr. Stephen Greenspan, who was qualified as an expert witness on intellectual disability and psychology. However, Dr. Greenspan testified that he never actually evaluated Thompson, and thus could not diagnose Thompson as intellectually disabled. The trial court precluded Dr. Greenspan from testifying on the basis that he had never actually evaluated Thompson, and the trial court did not consider his opinion regarding the issue of Thompson's intellectual disability. According to the trial court, allowing Dr. Greenspan's testimony would constitute buttressing another expert's opinion.

The trial court did, however, permit Thompson's counsel to proffer the intended content of Dr. Greenspan's testimony. According to counsel, Dr. Greenspan ***57** would have opined that Dr. Sultan's methodology "was more supported by the facts and data than [that of] Dr. Prichard." Further, Dr. Greenspan would have testified that Dr. Prichard did not do a complete evaluation, did not take the "practice effect" into account, and did not correctly use the applicable professional guidelines.

The circuit court issued an order on May 21, 2009, denying Thompson's motion for relief. The circuit court concluded that Thompson "failed to prove by clear and convincing evidence that he is [intellectually disabled]." The circuit court relied heavily on this Court's bright-line cutoff score of 70, established in *Cherry,* noting that even the defense expert's examination of Thompson yielded an IQ of 71, "which is above the threshold of 70." The court also concluded that because of the IQ scores above 70 collected throughout Thompson's childhood, "[the defense expert's] opinion takes in less than the whole picture, only a small part of it." The court also rejected Thompson's argument that *Cherry* should be rejected as wrongly decided.

Thompson appealed. On appeal, this Court affirmed the order of the circuit court, stating:

> Having reviewed the full record in this case and the circuit court's factual findings, we hold that there is competent, substantial evidence to support the circuit court's factual findings that Thompson is not mentally retarded, based on this Court's definition of the term as set forth in *Cherry.* In fact, Thompson's full-scale IQ scores on standardized tests administered from 1987 through 2009 were generally over 80: in 1987,

> Dr. Carbonnel administered the Wechsler Adult Intelligence Scale (WAIS) Revised Edition, where Thompson's full-scale IQ was scored as 85 (Verbal Performance IQ: 87; Performance IQ: 84); in 1988, Dr. Marina administered the WAIS Revised Edition, where Thompson's full-scale IQ was scored as 82 (Verbal IQ: 85; Performance IQ: 80); in 2009, Dr. Sultan administered the WAIS Fourth Edition, where Thompson's full-scale IQ was scored as 71 (Verbal Comprehension: 83; Perceptual Reasoning: 81; Working Memory: 77; Processing Speed: 56); and also in 2009, Dr. Prichard administered the Stanford Binet Fifth Edition, where Thompson's full-scale IQ was scored as 88 (Verbal IQ: 91; Non Verbal IQ: 86).

Thompson v. State, 41 So.3d 219, 2010 WL 1851473, at *1 (Fla.2010).

On May 26, 2015, Thompson filed his seventh motion for postconviction relief, the motion at issue in this case, in the circuit court, raising one issue: that Thompson's death sentence violated the Eighth and Fourteenth Amendments pursuant to *Atkins,* 536 U.S. 304, 122 S.Ct. 2242, and *Hall,* U.S. , 134 S.Ct. 1986. In that motion, Thompson argued that he was intellectually disabled and therefore ineligible for execution pursuant to *Atkins* and *Hall.* Thompson claimed that his 2009 initial hearing on intellectual disability was not a full and fair hearing because he could not put forth a below 70 IQ score and because the trial court was relying on this Court's decision in *Cherry.* Thompson asserted that even though his IQ scores may have been higher than 70, when considered together with his deficits in adaptive functioning, he could actually meet the definition of intellectual disability. Moreover, Thompson argued, it was clear that the circuit court did not consider the two other prongs of the intellectual disability test, because while the court spent more than four pages of its order explaining how Thompson failed to prove the first prong, its only mention of prongs two and three was one paragraph on the last page of the order. Finally, Thompson ***58** argued that under a *Witt* analysis, *Hall* should be retroactively applied to his case.

After a short hearing, at which no evidence was presented, the circuit court issued an order summarily denying Thompson's motion, stating that *Hall* did not create a new right and only required that courts consider the statistical error margin in determining IQ. The court held that *Hall* has no effect on individuals who were previously found not to be intellectually disabled because they did not have deficits in adaptive functioning or onset of intellectual disability prior to the age of 18. The court reasoned that it was sufficient under *Hall* that Thompson was afforded a full and complete evidentiary hearing in 2009 and had the opportunity to present evidence of intellectual functioning, deficits in adaptive functioning, and onset prior to the age of 18.

Because Thompson's IQ scores were generally over 80, and *Hall* only required courts to look at IQ scores of 75 and below, Thompson did not meet the first prong of the intellectual disability test. In finding that Thompson also failed to prove deficits in adaptive functioning, the court noted the testimony of the state's expert at the evidentiary hearing that Thompson was able to get into the military and work as a security guard. Finally, the court found that Thompson also failed to show onset before the age of eighteen because of the above factors. Thompson appealed.

ANALYSIS

It is clear that Thompson's previous hearing on intellectual disability was tainted by the bright-line cutoff of 70 for IQ scores established by this Court in *Cherry,* which was abrogated by *Hall.* By order dated February 27, 2009, this Court held that Thompson was entitled to an evidentiary hearing regarding his intellectual disability claim. *Thompson v. State,* 3 So.3d 1237 (Fla.2009). In so holding, this Court stated: "In making a determination of whether Thompson meets the requirements of mental retardation, the trial court shall consider the requirements set forth in *Cherry v. State,* 959 So.2d 702 (Fla.2007)...." *Id.* at 1238.

The circuit court cited *Cherry* numerous times in its 2009 order finding that Thompson had failed to prove he was intellectually disabled:

> Counsel for Defendant argued that Dr. Prichard [State's expert] was remiss for having failed to test adaptive functioning. Dr. Prichard explained that since the Defendant's IQ was above 2 standard deviations below the mean, and all 3 prongs of the test must be met, there was no need to test further. "Because we find that Cherry does not meet this first prong of section 921.137(1) criteria, we do not consider the two other prongs of the mental retardation determination." *Cherry,* 959 So.2d at 714.

In affirming the circuit court's 2009 order denying Thompson's intellectual disability claim, this Court stated:

> Having reviewed the full record in this case and the circuit court's factual findings, we hold that there is competent, substantial evidence to support the circuit court's factual findings that Thompson is not mentally retarded, based on this Court's definition of the term as set forth in *Cherry.*

Thompson v. State, 41 So.3d 219, 2010 WL 1851473, at *1.

The circuit court summarily denied Thompson's 2015 motion for postconviction relief, in which Thompson argued his right to a new intellectual disability hearing pursuant to *Hall,* stating:

> *Hall v. Florida* [U.S.], 134 S.Ct. 1986 [188 L.Ed.2d 1007] (2014), does not create a new right. The effect ***59** of the opinion is that the courts must consider the statistical error margin in determining IQ. It has no effect on individuals who were previously found not to be mentally retarded, now called intellectually disabled, due to a lack of deficits in adaptive functioning, and onset of the intellectual disability prior to the age of 18....
>
> In this case the Defendant was afforded a full and complete evidentiary hearing on the question of whether or not he is intellectually disabled. During the extensive two-day evidentiary hearing, the Defendant, through counsel, was afforded the opportunity to present evidence of his intellectual functioning (numerous expert and non-expert witnesses), as well as evidence of any deficits in adaptive functioning and whether there was an onset of an intellectual disability prior to the age of 18.

As this Court stated in *Oats, Hall* did not just require that courts consider the statistical error margin in determining IQ, it also changed the *manner* in which intellectual disability evidence must be considered: "courts must consider all three prongs in determining an intellectual disability, as opposed to relying on just one factor as dispositive ... because these factors are interdependent, if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of other prongs." 181 So.3d at 467 68. In *Hall,* the United States Supreme Court made clear that the assessment for intellectual disability is a "conjunctive and interrelated assessment." 134 S.Ct. at 2001. Therefore, it is not enough that a defendant be allowed to present evidence on all three prongs of the intellectual disability test.

Although Thompson did present some evidence relating to all three prongs of the intellectual disability test, he did not receive the type of conjunctive and interrelated assessment that *Hall* requires. Thompson has had a broad range of IQ scores from his childhood through adulthood. In 1958, at age 5, Thompson received a full-scale IQ score of 75 on the Stanford Binet test, in 1961, at age 8, he received a full-scale IQ score of 74 on the same test. In 1987, Thompson was found to have a full-scale IQ score of 85 on the WAIS R test, and in 1988 he received a full-scale IQ score of 82 on the same test.

Most recently, in 2009, in preparation for his initial hearing on intellectual disability, Thompson received a full-scale IQ score of 71 from the defense expert, and a full-scale IQ score of 88 from the State expert, on the WAIS IV and Stanford Binet tests, respectively. The trial judge could have determined the defense expert who, after assessing Thompson to have an full-scale IQ score of 71 and finding significant deficits in adaptive functioning, expressed his opinion that Thompson was intellectually disabled was credible, but was bound by *Cherry's* bright-line cutoff of 70. As the circuit court stated: "[Thompson's] own expert, Dr. Sultan testified that his IQ is 71, which is above the threshold of 70."

At his initial intellectual disability hearing, Thompson attempted to introduce the testimony of intelligence testing expert, Dr. Greenspan, in the hope that the expert could more fully explain the range of Thompson's IQ scores in relation to his adaptive functioning, including how significant deficits in adaptive functioning can affect a full-scale IQ score. Thompson proffered that this evidence could have been used to counteract the seemingly high full-scale IQ score of 88 found by the State's expert, who admittedly never tested Thompson's adaptive functioning nor considered that information because of the bright-line cutoff of 70 announced in *Cherry.* ***60** However, this expert was excluded by the circuit court because he had not personally examined Thompson.

Simply put, it is impossible to know the true effect of this Court's holding in *Cherry* on the circuit court's review of the evidence presented at Thompson's intellectual disability hearing, particularly on Thompson's range of IQ scores from 71 88. What is clear is that this Court instructed the circuit court to conduct Thompson's intellectual disability hearing pursuant to *Cherry,* a case that has since been abrogated by the United States Supreme Court in *Hall.* The circuit court took *Cherry* into consideration at Thompson's intellectual disability hearing and in denying Thompson's intellectual disability claim, and this Court relied on *Cherry* to affirm the circuit court's order. Because of this reliance on *Cherry's* bright-line cutoff of 70 for IQ scores, Thompson has yet to have "a fair opportunity to show that the Constitution prohibits [his] execution." *Hall,* 134 S.Ct. at 2001.

CONCLUSION

Accordingly, we reverse and remand Thompson's case back to the circuit court for a new evidentiary hearing regarding intellectual disability, to be conducted pursuant to the United States Supreme Court's holding in *Hall,* and this Court's holding in *Oats.*

It is so ordered.

LABARGA, C.J., and PARIENTE, QUINCE, and PERRY, JJ., concur.

LEWIS, J., concurs in result.

CANADY, J., dissents with an opinion, in which POLSTON, J., concurs.

CANADY, J., dissenting.

For the reasons I have explained in my dissent in *Walls v. State,* No. SC15 1449, So.3d , 2016 WL 6137287 (Fla. Oct. 20, 2016) (Canady, J., dissenting), I have concluded that *Hall v. Florida,* U.S. , 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), should not be given retroactive effect. I would therefore deny Thompson relief.

POLSTON, J., concurs.

All Citations

208 So.3d 49, 41 Fla. L. Weekly S510

Footnotes

1 This is an appeal from the circuit court's order denying a successive motion for postconviction relief, which was filed pursuant to Florida Rule of Criminal Procedure 3.851. Because the order concerns postconviction relief from a sentence of death, this Court has jurisdiction of the appeal under article V, section 3(b)(1), of the Florida Constitution.

2 *Witt v. State,* 387 So.2d 922 (Fla.1980).

3 Thompson requested, and this Court granted, supplemental briefing addressing the United States Supreme Court's opinion in *Hurst v. Florida,* —— U.S. ——, 136 S.Ct. 616, 619, 193 L.Ed.2d 504 (2016). However, we decline to address Thompson's *Hurst v. Florida* claim in this opinion because we remand Thompson's case for a new evidentiary hearing on intellectual disability pursuant to the United States Supreme Court's decision in *Hall* and this Court's opinion in *Oats.*

4 On remand, codefendant Surace was subsequently found guilty of second-degree murder in a retrial in which Thompson testified and took credit for the entire incident. *See Thompson,* 389 So.2d at 199.

5 Thompson then pursued relief in the federal courts, which was denied. *See Thompson v. Wainwright,* 787 F.2d 1447 (11th Cir.1986) (affirming denial of petition for writ of habeas corpus).

6 Thompson also raised three additional claims: (1) executing Thompson after thirty-one years on death row, particularly in light of his mental deficiencies, violates the Eighth and Fourteenth Amendments to the United States Constitution; (2) lethal injection violates the Eighth Amendment; and, (3) the September 17, 2006, American Bar Association Report evaluating the death penalty in Florida constitutes newly discovered evidence that Thompson's execution violates the Eighth and Fourteenth Amendments. The trial court struck these claims as exceeding the scope of the remand and, on appeal, this Court summarily denied these claims as without merit. *Thompson v. State,* 3 So.3d 1237 (Fla.2009).

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

8 The term "intellectual disability" will now be used in place of "mental retardation." *See* Fla. R.Crim. P. 3.203.

9 Dr. Prichard administered the Stanford–Binet 5 test, rather than the WAIS–IV test, due to concern for the "practice effect." The practice effect causes an individual's IQ scores to rise if that individual was administered the same IQ test within one year. According to Dr. Prichard, the Stanford–Binet 5 and WAIS–IV measure the same underlying attribute (IQ), but "go about it in very different ways," thus negating the practice effect.

10 Thompson received an IQ score of 85 in 1987 and 82 in 1988.

APPENDIX E

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

WILLIAM LEE THOMPSON

Defendant.
_____/

Case No. F76-3350B

JUDGE JACQUELINE HOGAN SCOLA

ORDER DENYING MOTION FOR POST CONVICTION RELIEF PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.850

THIS CAUSE having come before this Court on the Defendant's Motion for Post Conviction Relief pursuant to Florida Rule of Criminal Procedure 3.850, upon a claim of mental retardation under authority of *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242 (2002), and pursuant to the mandate of the Florida Supreme Court dated February 27, 2009; and, this Court having held an evidentiary hearing, reviewed the motions, and responses, the exhibits, the court file and records in this case, and being otherwise fully advised in the premises, hereby ***denies*** the Defendant's motion.

At the evidentiary hearing which was held on April 13, 2009 and April 27, 2009, the following witnesses testified under oath, as follows:

TESTIMONY AT THE HEARING

William Weaver

Weaver was a school teacher and a school principle for 27 years in Ohio. He was the head of special education for 25 years and taught for 5 years before becoming a principal. Defendant was his student in 8th grade science in 1968. He reviewed school records from both the N.Y.C. schools where Defendant attended school before moving to Ohio, and the Ohio school records. Weaver first reviewed Defendant's records when he was Defendant's teacher. Defendant struggled as a student. He didn't do homework, didn't complete tests, was distracted and distracted others. Defendant talked and misbehaved in class. The Defendant repeated 8th grade. The records indicated that Defendant's mother was asked to delay Defendant's entry into school at age 5 but she disregarded this request. Records reveal previous IQ scores of 75 in 1958 (age 5), 74 in 1959 (age 6), 74 in 1961 (age 8), 79 in 1963 (age 10), 73 in 1966 (age 13), and 70 in 1968 (age 15).

Weaver testified that in Ohio at the time 79 or below was considered "educable mentally retarded". There were no classes at that time in Ohio for these children. Defendant was in regular classes in 5th and 6th grades. Defendant repeated the 1st and 8th grades. He got poor grades in Weaver's class.

Weaver taught Defendant's 8th grade science class where Defendant did poorly academically. He found Defendant to be very friendly, "interactive in positive ways with others", though poorly dressed. Defendant always said hello to him and smiled. Weaver stated that the Defendant wanted to please and was a follower. Because Defendant's peers made fun of him at times, he interacted more with adults.

Weaver testified that Defendant had difficulty doing school work. He suffered from a speech impediment, and according to school records, Defendant was given speech therapy. Defendant had poor motor skills. He had a "clunky walk" and was clumsy.

In Weaver's opinion Defendant's mental age was at least a couple of years below his chronological age. Defendant was significantly developmentally delayed. As Defendant got older, he put less and less effort into his schooling and dropped out before 9th grade. He was promoted to the next grade at times because of his age. Defendant was "not great at math".

On cross examination, Weaver testified that he liked the Defendant when he had him in 8th grade the first time and for part of the Defendant's second year in 8th grade. Weaver testified that he doesn't know the standard for mental retardation in Florida, but in Ohio it was 80. Defendant's school records indicate that in 1st grade in 1959 Defendant had a short attention span. During his second time in 1st grade in 1960, Defendant was a good reader. In 1961, in 2nd grade the records indicate the Defendant read well out loud. According to the records, Defendant had a good reading comprehension at grade level in 1962. In 3rd grade Defendant was in a special ed. class. The records further indicate that in 1963 Defendant was easy going; however in 1964 records indicate he had poor impulse control. School records also indicate, that Defendant had poor speech and was uncoordinated. Weaver testified that an undetected hearing loss, which records indicate, could account for poor speech. Further, he testified that loss of attention span can be the result of a hearing loss. Weaver did not administer the Henman-Nelson test which Defendant took in 1968 in Junior High School and doesn't know how it was administered. The Defendant was recommended for the vocational program. Weaver, testified that the Defendant was making "excellent improvement" in vocational training and felt he would "continue to do well as long as he didn't step backwards."

Over the years Weaver said he has exchanged letters with the Defendant. Weaver found Defendant's letters to be "child-like" containing "rainbows and smiley faces." Weaver said the letters to him from Defendant are not available, but stated that they were fairly grammatically correct. Weaver testified about an episode where Defendant got in trouble for cutting down Christmas trees to give as gifts to some people at school. And though he stated that Defendant was a "follower" and not an "initiator", Weaver said that he is not aware of anyone's having told the Defendant to do that.

Dr. Faye Sultan

Dr. Sultan is a clinical psychologist. She has been practicing since 1982. She has never testified in Florida, but has testified many times in other states. She was qualified as an expert by the court and allowed to offer her opinion regarding the issue at hand.

Dr. Sultan first evaluated the Defendant at the request of CCRC in 1996. She evaluated the Defendant again shortly before the hearing in this case. At the recent evaluation, she administered the WAIS IV test, the latest version of the WAIS; her first time to ever administer the WAIS IV.

Dr. Sultan testified that she used the definition of Mental Retardation from the American Association for Mental Retardation "red book 2002". The criteria are: 1) level of IQ below norm by 2 standard deviations, 2) deficits in adaptive behavior, and; 3) onset prior to age 18.

In order to determine the Defendant's adaptive behavior, Dr. Sultan testified that she talked to a number of people about his childhood and early adult years. She is aware of Florida's definition of mental retardation. Dr. Sultan applied psychological standards to make her diagnosis. CCRC asked Dr. Sultan to administer an IQ test and to evaluate the Defendant to determine whether he met criteria for mental retardation. She testified that she utilized the WAIS IV because new tests would be 4 or 5 points lower than an old test, because over time scores rise. She administered the test in March 20, 2009. The WAIS IV tests four areas. Defendant's full scale score was 71. He was fully cooperative and Dr. Sultan testified that she thinks it was an accurate test and he was working to the best of his ability. Dr. Sultan does not believe that there was any indication that the Defendant was malingering. The Defendant was putting forth effort to answer questions that he didn't know.

In order to evaluate the Defendant, Dr. Sultan also reviewed Defendant's school records. She talked to Mr. Weaver, Helen Thompson (Defendant's mother), and Donna Adams (Defendant's common law wife from 1967-1976.). Dr. Sultan also read other evaluations that were done over the years. She testified that her results were similar to those in prior evaluations. IQ is basically stable over time. Defendant's skill level stopped at a 5th or 6th grade level. His reading level she stated is at a 6^{th} or 7^{th} grade level.

Defendant's raw scores on the WAIS indicate he has a learning disability, which does not preclude him from being mentally retarded. Dr. Sultan testified that the Defendant has a full scale IQ of 71, so she evaluated his adaptive functioning. Dr. Sultan believes Defendant also suffers from organic brain damage, but that is not the cause of his low IQ.

Dr. Sultan stated Defendant meets criteria in that his low IQ manifested before age 18. Dr. Sultan was unsure how to evaluate Defendant's adaptive functioning so she asked Dr. Greenspan how to test his adaptive functioning. Dr. Sultan wanted historical information. Weaver provided her with information about Defendant's social functioning, academic performance, learning style, language, and motor skills. His social skills were below grade level, and he was unable to make friends as he was less mature. Adams knew Defendant during his late

teenage and young adult years. She had to remind him to bathe and brush his teeth. Defendant didn't handle money well. Adams did the cooking, cleaning, laundry, etc.

Dr. Sultan testified that when assessing concurrent deficits, asking the guards at prison is not proper because the prison setting is structured so that the Defendant does not have to make any decisions. Everyone in prison would have adaptive functioning deficits if tested. Records show the Defendant from an early age did things not appropriate at the urging of, or teasing, by others. Mentally retarded people are interested in getting approval. Dr. Sultan opined that it is clear that the Defendant was the subject of harassment and mockery and his behavior response was inappropriate. His military records also show this inappropriate behavior. Defendant's response to being in court is inappropriate. He smiles and giggles, according to Dr. Sultan. (This Court notes that though the Defendant at times, smiled, the Court never observed or heard Defendant giggle, and there was nothing inappropriate about his smiling.)

As for the third prong, Dr. Sultan testified that the onset before 18 prong is documented from 1st grade on. She opined that the Defendant meets diagnostic criteria for mild mental retardation.

On cross-examination, Dr. Sultan testified that in 1996 CCRC asked her to interview Defendant, but that she did not do any testing then. When she did IQ testing in March 2009, the Defendant recognized her. She had also seen him in 2001. CCRC asked her to administer WAIS IV. It was the first time she had administered it. She practiced 15 - 20 hours to become competent to administer the test.

Dr. Sultan reviewed the DOC records contained in defense exhibits A&B. She was not provided with other DOC records.

Dr. Sultan did see in his records that Defendant had been in the military. She further noted that Defendant was a subject of harassment and mockery in the past and Defendant's response was to engage in certain behaviors.

The Defendant's scores on the WAIS IV were an 83 on verbal comprehension, 81 on the math calculations, 77 on working memory, and 56 on the processing speed. His full scale IQ was 71 by both hand and computer scoring. Dr. Sultan wrote down Defendant's answers in a legible form because she knew someone else would be looking at them, but this did not affect the processing speed score.

Dr. Sultan testified that the confidence level is designed into the test. Practice effect is repetition of an IQ test over a short period of time. Repeated taking of the test can increase the score. The last WAIS administered to Defendant was 20 years ago in 1988 and Defendant's score then was 82. Defendant also took the WAIS in 1987 and his score was 83. Dr. Sultan testified that the practice effect still applies after 20 years.

Dr. Greg Prichard

Dr. Greg Prichard has been a licensed clinical psychologist since 1996. He was accepted as an expert by the court and allowed to offer his opinion in the area of clinical psychology on the question at issue.

Dr. Prichard testified that under Florida law, there are two current IQ tests used to determine mental retardation WAIS IV and the Stanford-Binet 5th edition. He has not yet administered WAIS IV because he has not yet become sufficiently familiar with it to properly test with it, because it was recently released. If the test is not properly administered, the results are not valid.

Dr. Prichard met with the Defendant on April 6, 2009, in an interview room at the state prison. The state attorney and an attorney representing the Defendant were there as observers. He administered the Stanford-Binet 5, which he has administered at least 20 times. He did not administer the WAIS because of the practice effect. There needs to be about 1 year between the administration of tests for the practice effect to dissipate. The test is scored on test index scores for both verbal and non-verbal indices. Defendant's scores were 85 on the fluid reasoning subtest, 91 on the knowledge subtest, 86 on the quantitative reasoning subtest, 100 on the visual spatial subtest, and 86 on the working memory subtest. Defendant's non-verbal IQ score was 86, his verbal IQ score was 91, and his full scale IQ score was 88.

Dr. Prichard testified that if there are statistical differences in any of the sections, there could be a problem that needs to be explained. All of the Defendant's scores were within the low average range. Dr. Prichard also reviewed documents and determined that Defendant should not be considered mentally retarded. For a person to meet criteria for mental retardation, an IQ score of 70 or below is needed. Dr. Prichard's test results are consistent with other information he reviewed. It is consistent with other IQ tests previously administered to Defendant: Dr. Carbonell obtained a full scale IQ score of 85 in 1987, and Dr.

Marina in 1988 obtained a full scale IQ score of 82. These tests were both WAIS and administered 10 months apart. The Defendant scored worse on the second test. The practice effect doesn't happen to everyone.

Dr. Prichard reviewed Dr. Sultan's raw data and her report. He testified that clinically there is a problem with her scores. Her scores showed verbal 84, which were consistent with prior tests by Dr. Carbonell and Dr. Marina; the reasoning score was 81. The prior working knowledge score of 77 was statistically the same. The processing speed is clinically problematic. This is relevant because of the nearly 30 point difference. Although scoring is not really an average of the scores of the various sections, it is significant because the 56 pulls down the full scale IQ. Dr. Prichard explained that he believes the 56 indicates a possible learning disability or attention deficit problem, but does not indicate that the Defendant is mentally retarded. According to Dr. Prichard, Dr. Sultan's score is valid in that she technically recorded the scores according to the manual. The full scale score of 71 does not validly indicate mental retardation because it doesn't account for speed score of 56.

Dr. Prichard also noted that the Defendant's school records show IQ scores above 70, which means he is not mentally retarded.

Dr. Prichard testified that in terms of adaptive functioning, the Defendant has vocational and interactive skills which show he is not retarded. He managed to get into the Marines. The Defendant got his GED in prison, which is important because one has to function at 11th or 12th grade level to pass the GED test. People who are mentally retarded function at 6th grade level at best. Defendant was also a security guard. According to Dr. Prichard, Defendant functions as a low average person. The Defendant was also employed as a roofer, cook, and a truck driver. Mentally retarded persons don't do these kinds of jobs.

Dr. Prichard's opinion is that the Defendant is not mentally retarded. The Defendant does not meet any of the 3 prongs of the test.

On cross-examination, Dr. Prichard testified that he tested the Defendant on April 6, 2009 and that his report is dated April 8, 2009. Dr. Prichard testified that he tries to follow all test manuals and guidelines. Counsel for the Defendant and a representative from the State were present during Dr. Prichard's testing. The Defendant was also handcuffed during the testing, which is not an optimal situation, but corrections refused his request to remove the handcuffs.

Dr. Prichard reiterated that he reviewed the Defendant's school transcripts, transcripts from prior proceedings in this case, the reports of Dr. Marina and Dr. Carbonell, and Dr. Sultan's raw data. He did not review the Defendant's entire corrections file.

Dr. Prichard stated that the WAIS and Stanford Binet are equivalent in psycho-metric standards, which means that they test the same things. However, they are not the same tests. They assess the same kind of factors to render an IQ score. The WAIS is more commonly used because it is easier to administer. The latest version of the test should be administered, as it is normed on the recent population and the scores are compared to the current population. The Stanford Binet was last normed in 2003. The data may have been collected in 2000, but it was published in 2003. Confidence intervals should be taken into account.

Dr. Prichard was still administering the WAIS III up until the beginning of April, 2009. He is now administering the WAIS IV. The age of the test may affect the score. When asked about the practice effect, Dr. Prichard answered that the effect when using the same instrument is much more identifiable. He said that when a different test is given, the practice effect is not as clear. There's less research on the subject and it's more convoluted. The task demands are not identical on the WAIS and Stanford Binet; and because the task demands are different, the practice effect should be minimized. The tests are similar in how they assess IQ, but different in the task demands utilized. In other words, the tests go about it in different ways and with different subtests. The scores on the WAIS and Stanford Binet are comparable. Dr. Prichard testified that you don't want to give the same test because of the practice effect, although the practice effect doesn't always happen. He noted that when Dr. Carbonelll tested the Defendant's IQ, he scored an 85, and when Dr. Marina tested him 11 months later, her IQ score was 84. That Dr. Prichard testified that there are enough differences between the WAIS and the Stanford Binet and the task requirements that he was not concerned with the practice effect. To Dr. Prichard's knowledge, the last time the Defendant took the Stanford Binet was 40 years ago so the practice effect would not be a problem.

Dr. Prichard was hired by the State to evaluate Cherry (*Cherry v. State*, 959 So. 2d 702 (Fla. 2002)). He determined that Cherry was mentally retarded and testified on behalf of Cherry. In the Cherry case, Dr. Prichard testified that he didn't administer another IQ test because he trusted Dr. Burstein's results. They give the test the same way and interpret the results in the same manner.

The Defendant obtained a full scale IQ score of 84 on the Stanford Binet that was administered by Dr. Prichard. This result was consistent with the WAIS-R score of 85 obtained by Dr. Carbonelll and the results obtained by Dr. Marina. Dr. Prichard explained that because Defendant's IQ was not 2 standard deviations from the mean, the Defendant did not meet the first prong of the test, so the other 2 prongs were moot and he did not test adaptive functioning. However, he further stated that dependency does not necessarily indicate mental retardation.

When further questioned about the results, Dr. Prichard explained that his results were consistent with the scores obtained by Dr. Sultan. Defendant had a verbal score of 83 and a performance score of 81 on the WAIS administered by Dr. Sultan. Dr. Prichard testified that one must look at the big picture. The full score of 71 that Dr. Sultan obtained was because Defendant had a processing speed score of 56, which pulled the full scale score down. The speed score was more than 20 points less than the verbal. It is referenced in the testing materials that the tester should look at all the scaled scores and not just the full scale score. The point difference is statistically significant. Dr. Prichard stated that it is warned in the manual to pay attention to splits. He stated that you can't just look at the full scale score of 71, you also have to look at Dr. Carbonelll's and Dr. Marina's results of 85 and 84. The slow speed processing score could be due to a learning disability or processing defect. Even Dr. Sultan's verbal and performance scores indicate that the Defendant is not globally retarded. As the Defendant consistently scores in the low to mid eighties (80's) on the IQ tests, the question of mental retardation has been answered and no further testing was necessary.

Dr. Prichard explained that the higher scores are more likely to represent the Defendant's true capabilities. A person can't perform above his or her capabilities. Defendant's scores in the eighties (80's) are more representative of his capabilities. The lower scores could be because he was tired, distracted, or unwilling to cooperate. The three scores in the eighties (80's) represent Defendant's optimal functioning. According to Dr. Prichard, it's common sense that you can't score better than you are capable of.

During the administration of the Stanford Binet, the Defendant completed the subtests within the time frame given. Some things took longer than others. Dr. Prichard timed the tests because it was required. Some items in the answer booklet are blank. One reason is that the test has some screening built in. Based on early test results, the test might start on level 4. If the person does well on level 4, then levels 1,2, and 3 aren't given. Dr. Prichard told the Defendant to guess an answer. He wanted the Defendant to make an effort. A person would have to be a really

good guesser for the score to be inflated, which probably didn't happen in this case.

Dr. Prichard testified that mentally retarded people don't get into the military or work as security guards. It is above their capabilities. While the Defendant was in the military for only a few months, he was able to get a dishonorable discharge. His cheating in order to get out of the military demonstrates cognitive thinking. Dr. Prichard also noted that mentally retarded people are not to obtain a GED. While Defendant may have cheated, he ultimately was able to pass and that demonstrates learning.

Dr. Prichard also noted that Defendant's former employment demonstrated adaptive skills. A mentally retarded person typically cannot be a cook if it involves reading orders and preparing multiple meals at the same time. A mentally retarded person could not be a roofer unless it involved a rote activity such as passing up shingles.

Defendant's inability to handle money does not indicate he is mentally retarded.

According to Dr. Prichard, Defendant has some adjustment issues and likely some personality issues. He may have some neurological damage from drug abuse. There are a lot of reasons for adaptive difficulties, including Defendant's drug use.

ANALYSIS

Mental Retardation is defined in § 921.137, Fla. Stat. and Fla. R. Crim. P, 3.203.

> [T]he term "mental retardation" means significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly sub-average general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services.

This definition is consistent with that found in *Atkins v. Virginia*, 122 S. Ct. 2242 (2002).

> The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed.1992).
>
> The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly sub-average general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed.2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

Atkins, 122 S.Ct. at 2245, n3.

In *Cherry v. State*, 959 So.2d 702 (Fla. 2007), the Florida Supreme Court determined that under the plain reading of §921.137, Fla. Stat., that IQ be 2 standard deviations from the mean, which would be 70. The Florida Supreme Court determined that to be legally mentally retarded for purposes of avoiding execution, a person would need to have an IQ of 70 or below.

Defendant has failed to prove by clear and convincing evidence that he is mentally retarded. The Defendant's presentation does not demonstrate with any credible evidence that he is mentally retarded. Defendant's own expert, Dr. Sultan

testified that his IQ is 71, which is above the threshold of 70. However, even Dr. Sultan's full scale score of 71 is questionable. On Dr. Sultan's test, Defendant achieved a score of 83 on the verbal section and a score of 81 on the performance section. Defendant's full scale score was brought down by the 56 he obtained on the speed section. On cross-examination, Dr. Sultan never satisfactorily answered the question about the discrepancy between the speed score and the verbal and performance scores. In contrast, Dr. Prichard explained that the low speed score could be due to a learning disability. Dr. Sultan also testified that the Defendant has a learning disability. Dr. Marina had previously testified that the Defendant has slight brain damage, which could also cause the slow speed score.

In a prior proceeding, Dr. Stillman (Defendant's tab 21) testified that the Defendant was mentally retarded. Dr. Stillman did not do any testing. He reached this conclusion after speaking with the Defendant. Dr. Stillman also stated that the Defendant's IQ was below 80. This diagnosis does not meet the legal or clinical definitions of mental retardation.

Dr. Prichard explained that one must look at the big picture in determining IQ, to view the results not based on the score of one test or subtest, but based on all the results. Dr. Stillman also testified that that is the correct procedure.

> But, that's only one test. If you're talking about the overall picture, which is what we have to look at, and variables that the doctor has to look at the whole page. You can't look at one aspect and jump to a conclusion. So, if one test among 50, 30, 20 is out of line and all the others fall in line, to me, that sounds [sic] pretty good evidence.

Tab 21, page 100, Defendant's exhibit.

It appears that Dr. Sultan's opinion takes in less than the whole picture, only a small part of it. The educational records included at tab 8 of Defendant's exhibit, indicate that Defendant had IQ scores in the 70's on recognized tests. Those scores are above 70. Dr. Marina, Dr. Carbonell, and Dr. Prichard all obtained scores in the 80's. Every recognized IQ test result is above 70. The only score of 70 was on the "Henman-Nelson" test which is not recognized. Additionally, Defendant scored a "90" in 1959 on the California Multi-Phasic test, also not recognized.

Dr. Sultan's testimony that the practice effect lasts for over 20 years is doubtful, and in this case, refuted by the record. The Defendant scored *lower* on Dr. Marina's IQ test conducted approximately 1 year after Dr. Carbonell's IQ test. Clearly the practice effect did not obtain there. Defense counsel's argument that

the practice effect applies on different tests is not supported by the evidence or by logic.

Counsel for Defendant argued that Dr. Prichard was remiss for having failed to test adaptive functioning. Dr. Prichard explained that since the Defendant's IQ was above 2 standard deviations below the mean, and all 3 prongs of the test must be met, there was no need to test further. "Because we find that Cherry does not meet this first prong of the section 921.137(1) criteria, we do not consider the two other prongs of the mental retardation determination." *Cherry*, 959 So.2d at 741.

In closing argument, counsel for Defendant suggested that the Court in *Nixon v. State*, 2 So.3d 137 (Fla. 2009), had receded from *Cherry*. To the contrary, *Nixon* reiterates what was stated in *Cherry* and specifically rejects the claim that the Florida Supreme Court misinterpreted §921.137, Fla. Stat. Also, in the opinion that remanded this matter, the Florida Supreme Court stated:

> In making a determination of whether Thompson meets the requirements of mental retardation, the trial court shall consider the requirements set forth in *Cherry v. State,* 959 So.2d 702 (Fla. 2007):

Thompson v. State, 3 So.3d 1237 (Fla. 2009). Certainly the Florida Supreme Court would not have instructed this court to follow the requirements of *Cherry* were it to have receded from same.

In closing argument, counsel alternatively argued that this court should reject the holding of the Florida Supreme Court in *Cherry* because it was wrongly decided. The jurisdiction of the Circuit Courts is set forth in §26.012, Fla. Stat. Nowhere is the Circuit Court imbued with authority to reverse or ignore the decisions of the Supreme Court. To the contrary, in chap. 25 of the Florida Statutes, the Florida Supreme Court is given jurisdiction to hear appeals in cases where the defendant has been sentenced to death. This court declines to accept the invitation to ignore the law of this State and thus, rejects this argument.

Defendant further suggested in closing argument that this court should read the legislative history of §921.137, Fla. Stat. and take into account the error co-efficient. That argument has previously been raised and rejected by the Florida Supreme Court.

> Both section 921.137 and Florida Rule of Criminal Procedure 3.203 provide that significantly sub-average general intellectual functioning means "performance that is two or more standard deviations from the

> mean score on a standardized intelligence test." One standard deviation on the WAIS-III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70. As pointed out by the circuit court, the statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear. We defer to the plain meaning of statutes:
>
> When [a] statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. *See Lee County Elec. Coop., Inc. v. Jacobs,* 820 So.2d 297, 303 (Fla.2002). In such instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent. *See State v. Burris,* 875 So.2d 408, 410 (Fla.2004). When the statutory language is clear, "courts have no occasion to resort to rules of construction-they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power." *Nicoll v. Baker,* 668 So.2d 989, 990-91 (Fla.1996).

Cherry, 959 So.2d at 712-713.

Every expert, including Dr. Sultan, testified that Defendant's IQ is above 70. That would put the Defendant in the borderline category, which is not mentally retarded. There is no reliable evidence in this case, from the time of the Defendant's first penalty phase 33 years ago when he was first sentenced to death, to this day, that the Defendant is mentally retarded. Certainly there is nothing to meet the clear and convincing standard required under the law, and this Court so finds: Defendant is not mentally retarded.

Having heard and reviewed the evidence, this Court finds the Defendant is not mentally retarded. His IQ not only exceeds 70, but evidence suggests strongly his actual IQ could be in the 80's. He does not have deficits in adaptive functioning and has failed to prove onset before the age of 18. Defendant has not demonstrated by clear and convincing evidence that he is mentally retarded under the laws of the State of Florida. Therefore his claim is ***denied***.

WHEREFORE, it is ORDERED AND ADJUDGED that the Defendant's Motion for Post-conviction Relief is ***DENIED.***

It is further ORDERED AND ADJUDGED that the record on appeal be prepared and submitted to the Florida Supreme Court expeditiously.

DONE AND ORDERED in Miami-Dade County this 21st day of May, 2009.

Jacqueline Hogan Scola
Circuit court Judge

Copies furnished to:
Terri L. Backhus, counsel for Defendant
Chance Meyers, counsel for Defendant
Sandra Jaggard, AAG
Abbe Rifkin, ASA
(*Via facsimile*)

APPENDIX F

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,

v.

WILLIAM LEE THOMPSON,
Defendant

Case No. F76003350B
Judge Tinkler Mendez
Section 62

STATE'S MOTION FOR RECONSIDERATION & REQUEST TO DENY DEFENDANT'S SEVENTH MOTION FOR POST CONVICTION RELIEF PURSUANT TO PHILLIPS V. STATE

COMES NOW KATHERINE FERNANDEZ RUNDLE, State Attorney of the Eleventh Judicial Circuit of Florida, by and through the undersigned Assistant State Attorney, and files this Motion for Reconsideration requesting that the Court deny the Defendant's Seventh Motion for Post-Conviction Relief based on intellectual disability without an evidentiary hearing pursuant to the Florida Supreme Court's decision on May 21, 2020 in *Phillips v. State*, ___So.3d___, 2020 WL 2563476 (Fla. May 21, 2020).

INTRODUCTION

In 2016, the Florida Supreme Court remanded the Defendant's case for this Court to conduct a second evidentiary hearing on the Defendant's claim of intellectual disability. The remand was solely based on the Florida Supreme Court's opinion announced in *Walls v. State,* 213 So.3d 340 (Fla. 2016) that *Hall v. State,* 572 U.S. 701 (2014) was retroactive. However, this is now no longer the case, as the Florida Supreme Court in *Phillips* has receded from *Walls*, and now holds that *Hall* is not in fact retroactive.

As a result, the 2009 post-conviction court order finding that the Defendant is not intellectually disabled is controlling. Further, the post-conviction court's comprehensive order has already been affirmed by the Florida Supreme Court in 2010. For these reasons,

the State requests that this Court enter an order denying the Defendant's seventh motion for post-conviction relief, and submits the following in support of its position:

PROCEDURAL HISTORY

1. In April 2009, the post-conviction court conducted an evidentiary hearing wherein the Defendant attempted to prove that he was intellectually disabled. On May 21, 2009, the post-conviction court issued a detailed order examining the evidence presented by the parties and the applicable legal standards. The post-conviction court found that the Defendant failed to meet the evidentiary standard for the court to make a finding of intellectual disability. In its order denying the Defendant's motion, the court provided a thorough review of the expert testimony presented by the parties, and applied the analysis set forth in *Cherry v. State*, 959 So.2d 702 (Fla. 2007). *See Exhibit 1 "Order Denying Motion for Post Conviction Relief Pursuant to Florida Rule of Criminal Procedure 3.850."*

2. In 2010, the post-conviction court's 2009 order was affirmed by the Florida Supreme Court. The Court held that there was "competent, substantial evidence to support the circuit court's factual findings." *See Exhibit 2 Thompson v. State*, 41 So.3d 219 (Fla. 2010). This opinion was undisturbed for several years.

3. On May 26, 2015, the Defendant filed a seventh motion for post-conviction relief. The Defendant argued that based on the cases of *Atkins* and *Hall*, he was entitled to a new evidentiary hearing on the issue of intellectual disability. The post-conviction court disagreed, and summarily denied the motion.

4. On November 10, 2016, the Florida Supreme Court reversed and remanded the case for a new evidentiary hearing on intellectual disability that conformed to the United States Supreme Court's holding in *Hall*. *See Exhibit 3 Thompson v. State*, 208 So.3d 49. In its opinion, the Florida Supreme Court reasoned that the Defendant did not receive "the type of conjunctive and interrelated assessment that *Hall* requires," and considered *Hall* to apply retroactively. In his dissent, Justice Canady expressed that he disagreed with the majority's holding based on his opinion that *Hall* should not be applied retroactively.

5. On May 21, 2020, while the second evidentiary hearing on intellectual disability was pending before this Court, the Florida Supreme Court receded from its prior holding in *Walls* where it determined that *Hall* was retroactive. *See Exhibit 4 Phillips v. State*, ___So.3d___, 2020 WL 2563476 (Fla. May 21, 2020).

ARGUMENT

1. In *Phillips*, the Florida Supreme Court outlined the lengthy procedural history where the defendant sought relief from his sentence of death. Specifically under review was whether the evidentiary hearing on the defendant's intellectual disability claim conducted in 2006 was sufficient in light of the decisions in *Hall* and *Walls*.

2. Significantly, the Court concluded that it had previously "erred," and receded from its decision in *Walls* to find that *Hall* was retroactive. Accordingly, the Court determined that the defendant was not entitled to receive a reconsideration of his intellectual disability claim.

3. After announcing its decision in *Phillips*, the Florida Supreme Court quickly applied its holding to two other defendants similarly situated. *See Lawrence v. State*, SC18-1172 (June 11, 2020); *Cave v. State*, SC 18-1750 (June 11, 2020). In both *Lawrence* and *Cave*, the Court agreed that the defendants were not entitled to new evidentiary hearings on intellectual disability claims and affirmed the post-conviction court's order denying them such relief.

4. Applying *Phillips* to the instant matter, the Defendant is no longer entitled to a new evidentiary hearing on intellectual disability. The 2016 mandate from the Florida Supreme Court directing a second intellectual disability hearing relied exclusively on law that has now been explicitly overturned, and to conduct such a hearing would be an exercise in futility as it runs contrary to current law and other practical policy considerations such as judicial economy and promoting finality.

CONCLUSION

WHEREFORE, the State respectfully requests that this Court DENY the Defendant's Seventh Motion for Post-Conviction Relief without an evidentiary hearing on intellectual disability pursuant to the new legal authority of *Phillips, Lawrence,* and *Cave*.

Respectfully submitted,

KATHERINE FERNANDEZ RUNDLE
STATE ATTORNEY

BY: /s/ Jonathan D. Borst
Jonathan D. Borst
Assistant State Attorney
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BY: /s/ Jennifer A. Davis
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the above was furnished to defense counsel on this 19th day of June, 2020.

BY: /s/ Jonathan D. Borst
Jonathan D. Borst
Assistant State Attorney

APPENDIX G

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff, **Case No.: 76-3350B**

v.

WILLIAM LEE THOMPSON,
Defendant.

DEFENDANT'S RESPONSE TO STATE'S MOTION FOR RECONSIDERATION AND MOTION TO CANCEL DEFENDANT'S MANDATED EVIDENTIARY HEARING AND DENY HIS MOTION FOR POSTCONVICTION RELIEF

WILLIAM LEE THOMPSON, by and through undersigned counsel, hereby submits this Response to the State's Motion for Reconsideration and Request to Deny Defendant's Seventh Motion for Postconviction Relief Pursuant to *Phillips v. State* filed June 19, 2020. Mr. Thompson's case is pending before this Court pursuant to the Mandate issued by the Florida Supreme Court commanding this Court to hold an evidentiary hearing and consider evidence of his intellectual disability. This Court does not have the authority to disregard the Mandate, and accordingly, the State's motion must be denied on this threshold matter.[1] Mr. Thompson, who was identified in elementary school as "mentally retarded" and placed in special education classes, and who argued many years prior to the issuance of *Atkins*[2] that he is intellectually disabled, is entitled to a full and fair hearing conducted within the framework of a constitutionally valid legal standard wherein he can present evidence establishing that he is categorically barred from imposition of the death

[1] The ability of a lower court to disregard a duly issued mandate, or for that matter the ability of the Florida Supreme Court to recall its own mandate upon motion by the State, is an issue currently pending before the Florida Supreme Court related to the Florida Supreme Court's decision in *State v. Poole*, SC18-245, 2020 WL 3116597 (Fla. Apr. 2, 2020). *See State v. Okafor,* SC20- 323 (Fla. argued June 2, 2020). During the oral arguments in *Okafor*, the Justices appeared skeptical of the State's suggestion that a mandate could be recalled or ignored based on an intervening change in the law.

[2] *Atkins v. Virginia*, 536 U.S. 304 (2002).

penalty. To deny him such a hearing would violate his Fifth, Sixth, Eighth and Fourteenth Amendment rights as set out more fully below. This Court should deny the State's Motion.

INTRODUCTION

In 2002, the U.S. Supreme Court held in *Atkins* that the Eighth and Fourteenth Amendments prohibit a state from executing an individual who is intellectually disabled. *Atkins v. Virginia*, 536 U.S. 304. The Court, however, left to the states the task of defining intellectual disability. *Id*. In 2007, the Florida Supreme Court issued *Cherry v. State*, 959 So. 2d 702, which set Florida as an outlier in death penalty jurisprudence by imposing an unscientific cutoff requiring a capital defendant to present an IQ of 70 or below as a necessary fact to be proven in order to meet the criteria.

Seven years later, the U.S. Supreme Court held, in *Hall v. Florida*, that Florida's "rigid rule," as set out in *Cherry*, of an IQ cutoff of 70 "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." *Hall*, 572 U.S. 701, 704 (2014). In that seven-year span, capital defendants around the State, including Thompson, were denied under an unconstitutional doctrine.[3] Indeed, the *Cherry* opinion and the rule it announced have been widely criticized by legal scholars and experts in intellectual disability. *See* John H. Blume et. al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J.L. & Pub. Pol'y 689, 697 (2009) ("*Cherry* illustrates a recurring problem after *Atkins*: the failure of courts to apply the standard error of measurement and other practice effects to all IQ scores."); James W. Ellis, Caroline Everington, and Ann M. Delpha,

[3] 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 intellectual disability cases identified, every single case had been denied on the merits.)

Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases, 46 Hofstra L. Rev. 1305, 1357-1360 (2018); Lois A. Weithorn, *Conceptual Hurdles to the Application of* Atkins v. Virginia, 59 Hastings L. J. 1203, 1228-1234 (2008); Sarah E. Warlick and Ryan V.P. Dougherty, Hall v. Florida *Reinvigorates Concept of Protection for Intellectually Disabled*, 29-Winter Criminal Justice 4 (2015).

As a result of the Court's decision in *Hall*, both the U.S. Supreme Court and the Florida Supreme Court remanded cases to the lower courts for further evidentiary development or imposition of a life sentence. *Hall v. State*, 201 So. 3d 628 (Fla. 2016) (Remanded to the lower court for imposition of a life sentence). *See also Haliburton v. Florida*, 574 U.S. 801 (2014) (Remanded to the Florida Supreme Court in light of *Hall v. Florida*); *Haliburton v. State*, 163 So. 3d 509 (Fla. 2015) (Remanded to the circuit court to conduct an evidentiary hearing in consideration of *Hall v. Florida*); *Oats v. State*, 181 So. 3d 457 (Fla. 2015) (Remanded for determination of Oats' intellectual disability in light of *Hall v. Florida*). Mr. Thompson's case fell into this category. *Thompson v. State,* 208 So. 3d 49 (Fla. 2016) (Remanded for new hearing on intellectual disability claim that was denied based on bright-line test of whether defendant's IQ was 70 or below).

One month prior to remanding Thompson's case, in October 2016, the Florida Supreme Court determined that *Hall* was retroactive to cases where death-sentenced individuals had timely raised intellectual disability as a bar to execution, entitling them to have a holistic assessment of their claim under the appropriate clinical definitions and constitutional standards. *Walls v. State*, 213 So. 3d 340 (Fla. 2016). However, in Mr. Thompson's case the Florida Supreme Court noted while it had "determined that *Hall* is retroactive utilizing a *Witt* analysis, *Walls v. State,* 2016 WL 6137287 (Fla. Oct. 20, 2016), [failing] to give Thompson the benefit of *Hall,* which disapproved

of *Cherry,* would result in a manifest injustice, which is an exception to the law of the case doctrine." *Thompson*, 208 So. 3d at 50 (Fla. 2016). Thus, Thompson was given *Hall* relief premised not only on *Walls*, but on the recognition that a manifest injustice would result were he to be denied a new hearing under the principles announced in *Hall.*

Subsequently, four of the Justices who formed the majority in *Walls v. State* mandatorily retired, one in 2016 (Justice Perry) and three in 2019 (Justices Lewis, Quince, and Pariente).[4] Two new Justices who were appointed to the Florida Supreme Court were subsequently appointed to the United States Court of Appeals for the Eleventh Circuit. Two other newly appointed Justices, Justice Lawson and Justice Muniz, remain on the Court. Justice Canady became Chief Justice starting July 1, 2018.[5]

On May 21, 2020, the newly constituted five-Justice Florida Supreme Court *sua sponte* revisited *Walls* in *Phillips v. State*, SC18-1149, 2020 WL 2563476 (Fla. May 21, 2020). The majority–comprised of the dissenters in *Walls v. State* (Chief Justice Canady and Justice Polston) and the two new Justices (Justice Lawson and Justice Muniz)—receded from *Walls v. State* and held that "because *Hall* does not apply retroactively, it does not entitle Phillips to a reconsideration of whether he meets the first prong of the intellectual disability assessment." *Phillips*, 2020 WL 2563476 at *22. The majority said nothing about manifest injustice or the effect the decision would have on cases like Mr. Thompson's.

Justice Labarga, the only remaining Justice on the Florida Supreme Court who was in the

[4] The law at the time mandated retirement at age 70. That law was changed to age 75 in 2018 but because the new law did not become effective until July 2019, the Justices were bound by the prior law at the time of their January 2019 retirements.

[5] Our Chief Justice was also Chief Justice from July 2010 through June 2012. He was elected by his colleagues to serve as Chief Justice for a second time starting July 1, 2018, and a third time starting July 1, 2020. There were two vacancies on the Court when *Phillips* was issued May 21, 2020.

majority in *Walls*, dissented. Justice Labarga wrote that, "[y]et again, this Court has removed an important safeguard in maintaining the integrity of Florida's death penalty jurisprudence. The result is an increased risk that certain individuals may be executed, even if they are intellectually disabled[.]" *Phillips*, 2020 WL 2563476, at *23. The majority's decision produces an "arbitrary result" where an intellectually disabled capital defendant is "completely barred from proving" his intellectual disability "because of the timing of his legal process." *Id*. at *25.

FACTS

Mr. Thompson's mental abilities have been at issue in his case from the very beginning. *Thompson v. State*, 208 So. 3d. 49, 51 (Fla. 2016) ("Thompson's mental condition has been an issue in both his circuit court proceedings and his appeals before this Court"). In his 1989 resentencing proceeding, Thompson presented evidence of his intellectual disability as mitigation through lay and expert testimony that he was "a slow learner," that he "had an IQ of seventy-five, had been recommended for special education placement," that he was "mentally slow" and was "retarded." *Thompson v. State,* 619 So. 2d 261, 263-64 (Fla. 1993). Pursuant to Florida Statute section 921.137 (Imposition of The Death Sentence Upon an Intellectually Disabled Defendant Prohibited) and the U.S. Supreme Court's grant of certiorari review of *Atkins v. Virginia*, on November 15, 2001, Thompson timely filed a motion for postconviction relief challenging the constitutionality of his death sentence. On June 8, 2003, he amended his motion following the Court's decision in *Atkins.*[6] The State continually challenged Thompson's right to even have a

[6]Without any notice to counsel or the presence of Mr. Thompson, the circuit court dismissed Thompson's November 15, 2001 motion based on a motion to dismiss the court instructed the State to draft. The court also struck the June 18, 2003 amended pleading. On appeal, the Florida Supreme Court remanded allowing Thompson to refile his Rule 3.851 motion pursuant to *Atkins* and Florida Rule of Criminal Procedure 3.203 (2004) (Defendant's Intellectual Disability as a Bar to Imposition of the Death Penalty) within 30 days. *Thompson v. State*, 880 So. 2d 1213 (Fla. 2004). On August 9, 2004, Mr. Thompson refiled. The court again denied Thompson's motion, this time finding that he was procedurally barred from raising his intellectual disability as bar to execution because he had previously presented the evidence as mitigation in his 1989

hearing resulting in the Florida Supreme Court remanding his case *three times* for an evidentiary hearing.[7]

The circuit court eventually held a truncated evidentiary hearing in 2009.[8] Relying heavily on the unconstitutional standard established in *Cherry*, the court denied Thompson's motion (CC Order, May 21, 2009). Almost exclusively addressing only the first prong of the three-prong standard, the court found, "[e]very expert, including Dr. Sultan, testified that Defendant's IQ is above 70. That would put the Defendant in the borderline category, which is not mentally retarded." (CC Order, May 21, 2009, p. 14). As for the remaining two criteria the court, the circuit court did not conduct any analysis. Noting the strict limitations in *Cherry*, the court stated that when a defendant "does not meet the first prong . . . *we do not consider the two prongs* . . . ." (CC Order, May 21, 2009, p. 14) (emphasis added).

On appeal, the Florida Supreme Court affirmed the circuit court's ruling finding,

> Having reviewed the full record in this case and the circuit court's factual findings, we hold that there is competent, substantial evidence to support the circuit court's factual findings that Thompson is not mentally retarded, **based on this Court's definition of the term as set forth in *Cherry***.

penalty phase. The Florida Supreme Court found the determination was in error and remanded again, instructing the court to hold the evidentiary hearing. *Thompson v. State*, SC05-279, 962 So. 2d 340 (Fla. 2007) (unpublished table opinion). On August 8, 2007, Thompson again filed a Rule 3.851 motion challenging his sentence pursuant to *Atkins* and also included three additional claims. The lower court struck all claims except the challenge based on his intellectual disability, reading the Florida Supreme Court's mandate as requiring only a hearing on the *Atkins* claim, despite the timeliness of the remainder claims. The court again ignored the Mandate and denied Mr. Thompson's motion without a hearing. The court found he did not meet the strict cut off rule provided in *Cherry*. On appeal, the Florida Supreme Court again remanded for an evidentiary hearing. *Thompson v. State*, 3 So. 3d 1237 (Fla. 2009).

[7] The Florida Supreme Court remanded Thompson's motion with the specific directive to review the matter under the now-unconstitutional standard in *Cherry*. *Id.* at 1238 ("In making a determination of whether Thompson meets the requirements of mental retardation, the trial court shall consider the requirements set forth in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007)").

[8] References to the 2009 evidentiary hearing are cited as: "T1" refers to the first day of testimony, April 13, 2009; "T2" refers to the second day of testimony, April 27, 2009. The record on appeal concerning case SC09-1085 (appealing the denial of Mr. Thompson's *Atkins* claim) are referred to "PCR-IV."

Thompson v. State, SC09-1085, 41 So. 3d 219 (Fla. 2010) (unpublished table opinion) (emphasis added).

On May 26, 2015, Thompson timely filed the pending motion for post-conviction relief challenging the constitutionality of his death sentence premised on *Hall*, arguing that the court's initial assessment of his *Atkins* claim improperly relied on the unconstitutional rule announced in *Cherry* (Def. Mtn. to Vacate, May 26, 2015). Mr. Thompson requested an evidentiary hearing to present evidence that he meets all three prongs of intellectual disability (Def. Mtn. to Vacate, May 26, 2015, p. 2). The State once again objected. After review of the "Court files and documents, and hearing oral argument," this Court denied Thompson's motion (CC Order, July 10, 2015, p. 1). Relying on the record and order from the 2009 proceedings, this Court ruled that "the requirements of *Hall* were met." (CC Order, July 10, 2015, p. 3).

The Florida Supreme Court reversed and remanded for an evidentiary hearing "to be conducted pursuant to the United States Supreme Court's holding in *Hall*, and this Court's holding in *Oats*." *Thompson*, 208 So. 3d at 60. The Florida Supreme Court expressly found the requirements of *Hall* were not met in the lower court proceedings:

> Although Thompson has had a broad range of IQ scores over his lifetime, he received several IQ scores below 75, and in 2009 the defense expert tested him with a score of 71. In reviewing the history of this case, it is clear that Thompson did not receive the type of "conjunctive and interrelated assessment" that *Hall* requires, as more recently set forth in *Oats v. State*.

Id. at 50 (citations omitted). The Florida Supreme Court issued its Mandate on February 6, 2017.

More than three years later, on June 19, 2020, as the Parties were finally set to depose the State's expert, the State filed its Motion for Reconsideration and Request to Deny Defendant's Seventh Motion for Postconviction Relief Pursuant to *Phillips v. State*. This response follows.

ARGUMENT

I. THIS COURT IS BOUND BY THE MANDATE ISSUED BY THE FLORIDA SUPREME COURT COMMANDING THIS COURT TO HOLD AN EVIDENTIARY HEARING.

a. This Court does not have the authority to grant the State's motion.

The Florida Supreme Court remanded Mr. Thompson's intellectual disability claim and commanded this Court to hold further proceedings "in accordance with said opinion, the rule of this Court and the laws of the State of Florida." (FSC Mandate, SC 15-1752, Feb 6, 2017). Neither this Court nor the Florida Supreme Court has the authority to disregard or set aside that Mandate.

Issued on February 6, 2017, the court's Mandate became final more than three years ago (June 6, 2017) and cannot be withdrawn. Fla. R. App. Pro. 9.340 (a); Fla. R. Jud. Admin. 2.205 (b)(5); *In re Amendments to the Florida Rules of Judicial Administration and the Florida Rules of Appellate Procedure*, 125 So. 3d 743 (Fla. 2013) (A mandate may not be recalled more than 120 days after it has been issued.); and § 43.44, FLA. STAT. (2014). The Florida Supreme Court itself is without authority to reconsider its prior decision and withdraw Mr. Thompson's relief.

This Court also lacks authority to disregard or overturn the Florida Supreme Court's Mandate, and therefore, is unable to grant the State's motion and cancel the evidentiary hearing. *Brunner Enterprises, Inc. v. Dep't of Rev.*, 452 So. 2d 550, 552 (Fla. 1984) ("Lower courts cannot change the law of the case as decided by this Court or, alternatively, by the highest court hearing a case."). A trial court cannot alter or evade the mandate of an appellate court absent permission to do so, that permission cannot be simply inferred. *Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp.*, 328 So. 2d 825, 827 (Fla. 1975) (citing *Cone v. Cone*, 68 So. 2d 886 (Fla. 1953). In Florida, it is clearly established that "all questions of law which have been decided by the highest appellate court become the law of the case which, except in extraordinary circumstances, must be followed in subsequent proceedings, both in the lower and the appellate courts." *Brunner,* 452 So.

2d at 552. Where an appellate court issues a mandate, it is a final judgment and compliance therewith by the lower courts "is a purely ministerial act." *Id*. (quoting *O.P. Corp. v. Village of North Palm Beach,* 302 So. 2d 130, 131 (Fla. 197)).

The State incorrectly argues, and fails to provide any supporting legal authority, that Thompson's Mandate is now invalid because it "relied exclusively on law that has been explicitly overturned." (State's Mtn., June 19, 2020, p. 3). *Phillips* did not, neither expressly nor by implication, invalidate the Florida Supreme Court's Mandate that compels this Court to conduct an evidentiary hearing in Thompson's case. The law of this case remains, and despite the State's assertions, this Court's overruled 2009 Order is not reinstated and is not controlling. This Court is bound by the dictates of the Florida Supreme Court's 2017 Mandate and must proceed with an evidentiary hearing on Thompson's intellectual disability claim. *Brunner*, 452 So. 2d at 552.

Moreover, the substantive law has not changed. Capital defendants are still entitled to certain Eighth Amendment protections – i.e. against being executed if intellectually disabled – thus enforcing the Mandate in this case is not comparable to enforcing an unlawful or unconstitutional order. Mr. Thompson is still constitutionally entitled to a determination of whether he is intellectually disabled, and thus, a determination of whether he may be executed.

Indeed, the State cites no authority or rule that provides for or justifies the filing of its motion seeking to overturn a decision from three years ago. The Florida Supreme Court routinely holds that condemned inmates cannot relitigate in Rule 3.851 proceedings claims that that court adjudicated against them on direct appeal (e.g., *Lukehart v. State*, 70 So.3d 503, 524-525 (2011); *Schoenwetter v. State*, 46 So.3d 545, 561, 562 (Fla. 2010); *Johnston v. State*, 27 So.3d 11, 28-29 (Fla. 2010); *Allen v. State*, 854 So.2d 1255, 1261-1262 (2003); *Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1323 (1994)) or in prior postconviction proceedings (e.g., *Rivera v. State*, 260 So.3d

920, 928 (2018); *Lynch v. State*, 254 So.3d 312, 323 (2018); *Van Poyck v. State*, 116 So.3d 347, 362 (Fla. 2013); *Reed v. State*, 116 So.3d 260, 268 (Fla. 2013); *Grossman v. State*, 29 So.3d 1034, 1042 (Fla. 2010); *Hill v. State*, 921 So.2d 579, 585 (2006); *Owen v. State*, 773 So.2d 510, 515 n. 11 (claim 10) (2000)). Rule 3.851(e)(2) embodies a similar procedural bar. ("A claim raised in a successive motion shall be dismissed if the trial court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits"). To continue to enforce these procedural-bar rules against defendants but ignore them when the State asks this Court to about-face, reopen and reverse a decision that the Florida Supreme Court rendered in a defendant's favor on appeal would violate the doctrine of *Wardius v. Oregon*, 412 U.S. 470, 474 (1973), that the federal Due Process Clause "does speak to the balance of forces between the accused and his accuser." See also, e.g., *United States v. Bahamonde*, 445 F.3d 1225 (9th Cir. 2006); *Mauricio v. Duckworth*, 840 F.2d 454, 457-458 (7th Cir. 1988); *Camp v. Neven*, 606 Fed. Appx. 322, 326 (9th Cir. 2015); *State v. Wooten*, 260 So.3d 1060 (Fla. 4th DCA 2018) ("Due process . . . requires that discovery 'be a two-way street.' *Wardius* . . . at 475. . . .").

The teaching of *Wardius* is that, if significant procedural tools or benefits are made available to State's attorneys, litigants against the State must be given the same or similar tools or benefits. *See State v. Reimonenq*, 286 So.3d 412 (La. 2019). After the trial judge in *Reimonenq*, issued a ruling *in limine* excluding the testimony of a proposed prosecution witness, the prosecutor entered a *nol pros* and reindicted the defendant. The defendant filed a motion to quash, noting that "the state's decision to dismiss and reinstitute criminal charges is a power that defendant does not have." *Id*. at 414. Further, he argued, that established "precedent bars the state from flaunting its power by essentially granting itself a continuance in a way that substantially prejudices defendant's right to a fair trial." *Id*. On appeal, the Louisiana Supreme Court held:

> the motion to quash must be granted: Inherent in justice and the concept of fundamental fairness is ensuring a "balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 . . . . In its brief, the state openly acknowledges it could have sought writs from the appellate court and simply declined to do so. The state also suggests that dismissing and reinstituting these charges was simply "to put its case together." We find that in this case, the state's exercise of its statutory right . . . to dismiss and reinstitute charges against defendant upset this "balance of forces" to such a degree that it violates defendant's right to due process and fundamental fairness.

Id. at 417"; *See also Evans v. Superior Court*, 522 P.2d 681 (Cal. 1974) (giving defendants a state constitutional due process right to a pretrial order requiring the prosecution to conduct a lineup); *People v. Mena*, 277 P.3d 160 (Cal. 2012) (adhering to Evans despite post-Evans legislation that might have been read as limiting defense discovery to statutorily enumerated procedures that do not include lineups); and see *United States v. Ash,* 413 U.S. 300, 309 (1973) (noting the Sixth Amendment's concern against "the imbalance in the adversary system that otherwise [that is, without defense counsel] resulted with the creation of a professional prosecuting official"). To allow the State to shrug off *Thompson v. State*, 208 So.3d 49 (Fla. 2016), as though it never happened would make a mockery of *Wardius.*

The State's position that "conduct[ing] such a hearing would be an exercise in futility as it runs contrary to current law and other practical policy considerations such as judicial economy and promoting finality" (State's Mtn., June 19, 2020, p. 3) is an insufficient basis to authorize this Court to ignore a lawfully issued mandate. A change in the law of the case should only be made in those situations where strict adherence to the rule would result in "***manifest injustice***." *Brunner*, 452 So. 2d at 552–53 (quoting *Strazzulla v. Hendrick,* 177 So. 2d 1, 4 (Fla. 1965)). Permitting a capital defendant to demonstrate that he is intellectually disabled – with the constitutionally and scientifically appropriate considerations given to a full presentation of the evidence, as required by the Eighth Amendment and articulated by the Supreme Court of the United States – as a bar to

his execution could never be considered manifest injustice. On the contrary, the Florida Supreme Court held the precise opposite four years ago, "**to fail to give Thompson the benefit of *Hall*, which disapproved of *Cherry*, would result in a manifest injustice"** *Thompson*, 208 So. 3d at 50 (parenthetical omitted) (emphasis added).

Concerns of judicial economy and finality cannot override a capital defendant's timely request to present evidence establishing that he is categorically barred from a sentence of death, nor is it a basis to ignore a mandate. Such a position wholly undermines the gravity of the power the State has in seeking death.

> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

Hall v. Florida, 572 U.S. 701, 723 (2014). This Court lacks the authority to ignore the duly issued Mandate in this case. The State's motion must be denied.

b. *Phillips* does not apply to Thompson as these cases stand in remarkably different postures.

The Florida Supreme Court's decision in *Phillips* to recede from *Walls* does not apply to Thompson. In *Phillips*, the court does not address the retroactive effect of *Phillips* itself, or include any language to suggest that the holding in *Phillips* should apply retroactively to other capital defendants. *See Phillips v. State*, SC18-1149, 2020 WL 2563476 (Fla. May 21, 2020). On the contrary, the Florida Supreme Court's ruling in *Franqui v. State*, SC19-203, 2020 WL 2205327 (Fla. May 7, 2020), suggests *Phillips* would apply only to defendants who have yet to raise a claim based on *Walls*.

Leonardo Franqui, whose case was decided a mere two weeks before *Phillips*, is in a similar

posture to that of Mr. Thompson. *See Franqui*, 2020 WL 2205327. Unlike Phillips, Franqui was granted *Hall* relief and remanded to the circuit court pursuant to *Walls*. *Franqui v. State*, 211 So. 3d 1026 (Fla. 2017). The court's decision not to recede from *Walls* in its May 7, 2020 *Franqui* decision confirms that *Phillips* does not apply to cases where the Florida Supreme Court issued a mandate compelling the lower court to hold an evidentiary hearing on the issue of intellectual disability pursuant to *Hall* and *Walls*.

The State points to three recent Florida Supreme Court decisions, *Lawrence v. State*, SC18-1172, 2020 WL 3088793 (Fla. June 11, 2020), *Cave v. State*, SC18-1750, 2020 WL 3088799 (Fla. June 11, 2020), and *Pooler v. State*, SC18-2024, 2020 WL 3580001 (Fla. July 2, 2020) in support of their argument that this Court can ignore the Florida Supreme Court's Mandate. However, meaningful factual and procedural differences distinguish these cases from Mr. Thompson's case. Lawrence, whose case became final in 1998, did not assert an intellectual disability claim until 2018, well after *Atkins* and *Hall* were issued. Similarly, Cave's case became final in 1999, but he failed to file an intellectual disability claim until 2017. Neither Lawrence nor Cave raised or litigated timely *Atkins* challenges, nor did they timely raise *Hall* challenges. Instead, the two defendants filed Rule 3.851 motions years after the issuance of *Atkins* and *Hall*, raising *Walls* and *Moore v. Texas* challenges. Likewise, Pooler, whose sentence became final in 1998, failed to timely raise intellectual disability as a bar to execution following *Atkins* and Rule 3.203. Instead, Pooler filed a claim in 2015, following *Hall*, which the circuit court denied as time-barred. The Florida Supreme Court's ruling that *Hall* is not retroactive to these three defendants is not instructive here. Lawrence, Cave, and Pooler were not proceeding in the lower courts pursuant to a lawfully issued mandate. All three defendants stand in a far different posture than that of Thompson.

Although the Supreme Court of the United States has not yet expressly ruled on the issue of retroactivity, *Hall* arose on review of state collateral proceedings. *See Hall*, 572 U.S. 701. By addressing the issue in a collateral proceeding, the U.S. Supreme Court made it clear that it intended its holding in *Hall* to apply to defendants, like Thompson, who timely challenged their death sentences on collateral review.

Both the U.S. Supreme Court and the Florida Supreme Court remanded cases for further consideration in light of *Hall*, before *Walls* was decided. Following Hall's remand by the U.S. Supreme Court, the Florida Supreme Court vacated his death sentence and remanded his case for the imposition of a life sentence. *Hall v. State*, 201 So. 3d 628 (Fla. 2016). Like Thompson, Hall's intellectual disability claim had been denied under the *Cherry* standard.

> Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test. Florida is one of just a few States to have this rigid rule. Florida's rule misconstrues the Court's statements in *Atkins* that intellectually disability is characterized by an IQ of "approximately 70." 536 U.S., at 308, n. 3, 122 S.Ct. 2242. Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. 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. Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.

Hall, 572 U.S. at 724.

Hall's death sentence was affirmed by the Florida Supreme Court in 1981. Mr. Thompson's death sentence was affirmed in 1993. Both defendant's intellectual disability claims were rejected under the same unconstitutional precedent—*Cherry*. The U.S. Supreme Court held that the Eighth Amendment guaranteed Hall evidentiary development and full consideration under *Atkins*. That holding applies equally to Thompson.

Similarly, Jerry Leon Haliburton, whose case was final in 1991, but who had timely filed

an *Atkins* claim which was wrongly denied under Cherry, was granted *Hall* relief. Haliburton's petition for a writ of certiorari on his *Atkins* claim was pending at the U.S. Supreme Court when *Hall* issued. The Court, without any discussion of retroactivity, remanded Haliburton's case to the "Florida Supreme Court for further consideration in light of *Hall[]*." *Haliburton v. Florida*, 574 U.S. 801 (2014) (citations omitted). On remand, the Florida Supreme Court issued the following:

> Upon reconsideration of this matter as ordered by the United States Supreme Court in *Haliburton v. Florida*, 135 S.Ct. 178 (2014), we vacate our previous order of affirmance dated July 18, 2013, and remand this case to the trial court for an evidentiary hearing under Florida Rule of Criminal Procedure 3.203.

Haliburton v. State, SC12-893, 163 So. 3d 509 (Fla. 2015) (unpublished table opinion). These cases make it abundantly clear that Thompson is entitled to an evidentiary hearing that comports with *Hall.*

II. TO DENY MR. THOMPSON A MEANINGFUL OPPORTUNITY TO ESTABLISH THAT HE IS INTELLECTUALLY DISABLED UNDER SOUND CLINICAL AND LEGAL STANDARDS VIOLATES THE FIFTH AND EIGHTH AMENDMENTS AND CREATES AN UNDUE RISK THAT THE STATE OF FLORIDA WILL EXECUTE AN INTELLECTUALLY DISABLED PERSON

The Eighth Amendment commands this Court to ensure that no persons with intellectual disability are executed, "for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." *Hall v. Florida*, 572 U.S. 701, 708 (2014). To protect this vulnerable class of defendants, capital sentencing procedures must be consistent with the "evolving standards of decency that mark the progress of a maturing society," *Atkins v. Virginia*, 536 U.S. 304, 312 (2002); otherwise, they violate the Eighth Amendment, *see Woodson v. North Carolina*, 428 U.S. 280 (1976), *Roberts v. Louisiana*, 428 U.S. 325, 332- 33 (1976), as do capital sentencing procedures that are inconsistent with the consensus of contemporary practice in the nation. *Beck v. Alabama*, 447 U.S. 625, 635 (1980).

The very rule in *Cherry* undermined the reliability of Florida's capital sentencing scheme. The *Cherry* analysis contravened medical and scientific research and practices and used a bright-line cut off in attempting to determine a diagnosis that requires a complex and layered approach. *See Hall*, 572 U.S. 701.

> Intellectual disability is a condition, not a number. See DSM–5, at 37. Courts must recognize, as does the medical community, that the IQ test is imprecise. This is not to say that an IQ test score is unhelpful. It is of considerable significance, as the medical community recognizes. But in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number.

Id. at 723.

An analysis that "ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability." *Id*. The decision in *Hall* highlighted the very concerns of such a practice,

> [p]ursuant to this mandatory cutoff, sentencing courts cannot consider even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances.

Id. at 712.

Mr. Thompson's case lies at the very core of *Hall*'s ruling and the Eighth Amendment prohibition against the execution of the intellectually disabled. The circuit court denied. Thompson's claim doing precisely what *Hall* prohibits: relying solely on an IQ score above 70 to preclude a finding of intellectual disability. Without further evidentiary development and consideration using the proper holistic approach, this Court will in essence determine Thompson's eligibility for the death penalty under an unconstitutional evidentiary standard. In

doing so, this Court must disregard evidence of impairments that establish Thompson's intellectual disability if adjudicated at a hearing which was "informed by the views of medical experts." *Moore v. Texas*, 137 S. Ct. 1039, 1044 (quoting *Hall*, 572 U.S. at 721).

Due Process and fundamental fairness are critical to the integrity and reliability of capital litigation. Where the stakes are the highest and the sentence is the gravest our society can impose, courts must be ever vigilant in protecting the procedural rights of those litigants. The shift in the law required by our nation's evolving standards of decency, requires this Court to look to established medical and scientific practices and examine Mr. Thompson's case in a holistic manner which can only be done by conducting an evidentiary hearing.

a. This Court cannot rely on findings from 2009 as they are premised on the unconstitutional standard set in *Cherry v. State,* and therefore, constitutionally infirm.

The State surmises, without citation to any legal authority, that the 2009 Order denying Mr. Thompson relief is now "controlling." (State's Mtn., June 19, 2020, p. 2). Asserting that the court "provided a thorough review of the expert testimony presented by the parties, and applied the analysis set forth in *Cherry v. State*, 959 So.2d 702 (Fla. 2007),"[9] the State calls the Order "comprehensive." (State's Mtn., June 19, 2020, p. 2). The State asserts the Order can stand because the Florida Supreme Court previously affirmed the lower court's decision finding "there is competent, substantial evidence to support the circuit court's factual findings." (State's Mtn., June 19, 2020, p. 2). The problem with the State's argument is two-fold: 1) it ignores the 2017 Mandate as set out *supra,* and 2) it ignores the fact that the 2009 order was upheld based on an objectively unreasonable application of clearly established federal law as set out by the Supreme

[9] Notably, the State fully acknowledges the court's reliance on a standard that "contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world." *Hall v. Florida*, 572 U.S. 701, 724 (2014).

Court of the United States. "It is clear that Thompson's previous hearing on intellectual disability was tainted by the bright-line cutoff of 70 for IQ scores established by this Court in *Cherry*, which was abrogated by *Hall*." *Thompson v. State,* 208 So. 3d 49, 58 (Fla. 2016).

In 2010, the Florida Supreme Court said: "that there is competent, substantial evidence to support the circuit court's factual findings that Thompson is not mentally retarded, **based on this Court's definition of the term as set forth in *Cherry***." *Thompson v. State*, SC09-1085, 41 So. 3d at 210 (unpublished table opinion) (emphasis added). The 2009 court Order and the 2010 Florida Supreme Court opinion affirming that order applied the unconstitutional *Cherry* standard. Neither the prior hearing nor the court's analysis premised on unconstitutional legal standards are valid and reliable such that this Court can rely on them to make a determination as to Mr. Thompson's Eighth Amendment claim.

b. Mr. Thompson is intellectually disabled and constitutionally excluded from execution under *Atkins v. Virginia*, *Hall v. Florida* and the Eighth Amendment of the U.S. Constitution.

Mr. Thompson is categorically excluded from eligibility of a death sentence because he suffers from intellectual disability. Evidentiary development, considered under constitutional standards, will show he meets the criteria set out in Florida Statutes section 921.137(1), "as he has significantly subaverage general intellectual functioning[,] existing concurrently with deficits in adaptive behavior[,] and manifested during the period from conception to age 18."

i. School officials identified and documented Mr. Thompson as intellectually disabled prior to 18

School records unequivocally establish Thompson's intellectual disability began most likely at birth. *See Thompson*, 208 So. 3d at 52 ("Testifying from school records, an elementary school principal stated that Thompson had an IQ of seventy-five, had been recommended for special educational placement, and had been a follower, not a leader."). Thompson took the

Stanford-Binet IQ test in 1958, when he was five years old, achieving a full-scale IQ score of 75. *Id*. at 59. Subsequent testing in school corroborated that score.

In 1961, school officials found Thompson eligible for EMR or "educable mentally retarded"[10] classes (T. 39, 70). He was placed in EMR classes where he remained through fourth grade, but then moved to a school that did not offer special education classes (T. 39, 44). Removed from special education classes, Thompson obtained Ds and Fs in main stream classes (T. 40). Although he was held back several times (in the first, fifth, and eighth grades), over the course of his education, Thompson was also frequently "placed" in the next grade when he could not pass the curriculum (T. 50). By the time he was in the eighth grade, Thompson was 18 while his classmates were 14 (T 50). He dropped out of school before ninth grade. Mr. Thompson's school records and school-age IQ tests clearly demonstrate that he meets the third requirement of the intellectual disability criteria - onset before the age of 18.

ii. Mr. Thompson has established that he has deficits in Adaptive Functioning

Florida Rule of Criminal Procedure 3.203(b) provides that, "[t]he term 'adaptive behavior,' for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." *See Also* AMERICAN PSYCHOLOGICAL ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 38 (5th ed. Text Rev. 2013) (1952) [hereinafter DSM-5].

The medical and scientific community describe adaptive behavior as "the collection of conceptual, social, and practical skills that are learned and performed by people in their everyday

[10] Hereinafter, EMR or special education classes.

lives." American Association on Intellectual and Developmental Disabilities Definitions, https://www.aaidd.org/intellectual-disability/definition (last visited July 21, 2020) [hereinafter AAIDD];[11] *see also* DSM-5, *supra*. Intellectually disabled individuals will show significant deficits in at least *one* of three areas:

- Conceptual skills—language and literacy; money, time, and number concepts; and self-direction.
- Social skills—interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), social problem solving, and the ability to follow rules/obey laws and to avoid being victimized.
- Practical skills—activities of daily living (personal care), occupational skills, healthcare, travel/transportation, schedules/routines, safety, use of money, use of the telephone.

AAIDD, *supra*; *see also* DSM-5, *supra.*

When assessing this prong, the focus must be on the defendant's deficits not his strengths. *Moore v. Texas*, 137 S. Ct. 1039, 1050 (recognizing "the medical community focuses the adaptive-functioning inquiry on adaptive deficits" and criticizing state court for "overemphasiz[ing] Moore's perceived adaptive strengths" such as the fact that Moore "lived on the streets, mowed lawns, and played pool for money").

In 2009, Defense expert Faye Sultan, Ph.D. conducted interviews of Thompson's mother Helen Thompson, wife Donna Adams, and school teacher Bill Weaver to aid in her determination as to Thompson's deficits in adaptive functioning.[12] In 2017, anticipation of the impending hearing, Defense expert Robert Ouaou, Ph.D. conducted interviews of the same witnesses plus a childhood friend Glen Anderson. In these interviews, Dr. Ouaou utilized the Adaptive Behavior

[11] The American Association on Intellectual and Developmental Disabilities is the leading professional association concerned with the diagnosis and treatment of intellectual disability.

[12] Following his time as Mr. Thompson's teacher, Mr. Weaver held positions as Principal and Director of Special Education in the Liking Valley School District.

Diagnostic Scale ("ABDS") (2016), a testing instrument to determine the presence and magnitude of adaptive deficits.[13] Both experts concluded that Thompson exhibits clear deficits in adaptive functioning. Ouaou opined that the deficits are severe[14] (Report of Dr. Ouaou, June 23, 2020, p. 5).

It became clear early-on that Thompson suffered from deficits in adaptive functioning. In an interview with Oauou, Helen Thompson, Thompson's mother described[15] him as "slow" and "entirely different" from his siblings (Report of Dr. Ouaou, June 23, 2017, p. 4). She explained that he required daily instruction and direction to perform basic hygiene tasks (Report of Dr. Ouaou, June 23, 2017, p. 4). A friend from childhood, Glen Anderson remembers Thompson was in special education and also describes him as "slow." He told Ouaou about other children bullying Thompson (Report of Dr. Ouaou, June 23, 2017, p. 4).

Mr. Bill Weaver, Thompson's childhood teacher, describes him as "the most academically challenged child I had." *Thompson*, 208 So. 3d. at 55. Thompson performed well below expected grade levels and was seen as clumsy and slow. *Id*.; (Report of Dr. Robert Ouaou, June 23, 2017, p. 4).

Donna Adams, Thompson's wife, describes him as having "the mind of a child," and says he is "like a big overgrown kid who was desperate for love and approval of the adults around him." (Affidavit of Donna Adams, June 17, 1987, p.1-2). Because of his deficits, Donna worried about his safety and judgment noting, "poor Bill was just not smart enough to realize that most people won't love him no matter what he did, but would take advantage of his good nature and simple

[13] The ABDS meets the contemporary standards for standardization, reliability, and validity in the measurement of adaptive behavior.

[14] Dr. Ouaou completed a written report which was provided to the Court and the State in June 2017, and is attached to this pleading for the Court's convenience. (*See* Attachment A).

[15] Helen Thompson passed away in 2019.

mind." (Affidavit of Donna Adams, June 17, 1987, p.2).

At the 2009 hearing Dr. Sultan opined that at age fifty-seven Mr. Thompson functioned at the same intellectual level as he was at age ten, which shows onset before the age of eighteen and excludes an injury later in life as a possible cause of Thompson's poor intellectual functioning (T. 107). As he got older, "the discrepancy between his chronological age and his mental age grew" (T. 108). Thompson has the mental skills of roughly a twelve-year-old, which are reading on a sixth to seventh grade level and writing grammatically correct sentences and paragraphs (T. 108).

The State's expert, Gregory Prichard, Psy.D., has never administered an adaptive deficit testing instrument regarding Thompson or conducted an in-depth interview to ascertain context about his background. Indeed, in 2009, Dr. Prichard testified that he didn't conduct any adaptive deficits analysis because he believed Mr. Thompson failed under *Cherry*. *Thompson*, 208 So. 3d at 56. In his report, Prichard fails to note the significant deficits Thompson demonstrated in school including the times he was held back, or the key findings regarding Thompson's attention and learning problems as early as the first grade (Report of Dr. Robert Ouaou, June 23, 2017, p. 4); (*see also* Report of Dr. Prichard, April 8, 2009).

Prichard based his opinion on "'common-sense,' his interactions with Thompson, and a review of Thompson's records" to opine that Mr. Thompson was not intellectually disabled because of his "ability to enlist in the Marines, obtain his GED, and work as a security guard, cook, roofer and truck driver." *Thompson*, 203 So. 3d at 56. However, a deficit is not cancelled out by a strength. A deficit is a deficit. *See Moore*, 137 S. Ct. 1039.

In 2019, Prichard re-interviewed Thompson; however, he still did not conduct any IQ or adaptive deficit testing.[16] Despite the significant changes in the law requiring reliance on

[16] See Report of Dr. Prichard, Oct. 21, 2019.

prevailing norms in the scientific and medical community when assessing intellectual disability in the forensic setting, Prichard again concluded Mr. Thompson is not intellectually disabled based solely on his IQ scores (Report of Dr. Prichard, Oct. 21, 2019, p. 4-5) ("In spite of Dr. Ouaou suggesting that adaptive deficits were in the severe range and hence suggest his intellectual disability, Mr. Thompson's IQ measured ID has clearly been established to be in the high borderline to low average range"). Dr. Prichard's assessment cannot withstand meaningful judicial or scientific scrutiny.

iii. Mr. Thompson has established significant deficits in intellectual functioning with IQ scores in the Intellectually Disabled range

Valid tests administered by qualified professionals establish that Mr. Thompson has significant deficits in intellectual functioning consistent with being mildly Intellectually Disabled. "Mild levels of intellectual disability . . . nevertheless remain intellectual disabilities," and Florida "may not execute anyone in 'the *entire category* of [intellectually disabled] offenders." *Moore,* 137 S. Ct. at 1051 (emphasis added) (quoting *Roper v. Simmons*, 543 U.S. 551, 563-64 (2005)). Florida defines intellectual disability as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifesting during the period from conception to age 18." Fla. R. Crim. P. 3.203(b). "Significantly subaverage general intellectual functioning" is understood as "performance that is two or more standard deviations from the mean score on a standardized intelligence test." *Id.* Because the mean score of an IQ test is 100, an IQ "approaching 70" or under is consistent with intellectual disability. *See Hall,* 572 U.S. 701; *Hall v. State*, 201 So. 3d 628, 634-35 (Fla. 2016). It is the prevailing clinical standard to afford a five-point standard error of measurement ("SEM") to the tested individual due to the "statistical fact" that imprecision inherently exists in IQ testing, therefore, an IQ score of 75 or below is consistent with a diagnoses of intellectual disability. *See id.* As the U.S. Supreme Court clarified in *Hall v.*

Florida, an IQ test's "standard error of measurement 'reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score.'" *Moore,* 137 S. Ct. at 1049.

Mr. Thompson has been administered eleven IQ tests over the years. (*See* Attachment B). Several of the tests resulted in IQ scores under 80 and some under 75, six scores of which are results of tests administered while in grade school.[17] Beginning at age 5, he received a full scale IQ of 75 on the Stanford-Binet, and he received a 74 on the same test three years later at age 8. *Thompson*, 208 So. 3d. at 59.

In 2009, Dr. Sultan administered the WAIS-IV. Because these tests must be normalized or keyed to the current level of human intelligence which rises incrementally over time, and

[17] Florida Law recognizes only two tests to be used in consideration of whether someone is intellectually disabled, the Wechsler Adult Intelligence Scale (WAIS) and the Stanford-Binet. FLA. ADMIN. CODE ANN. R. 65G-4.011 (2004). This Court cannot consider the test results of five of Thompson's scores obtained on unacceptable testing instruments. These include three scores from the school administered Cal. MM: Thompson received a 74 in 1958, a 90 in 1959, and a 79 in 1963. In 1966 and 1968 (7th and 8th grade), he took the Henmon-Nelson test and received scores of 70 and 73.

In 1987 and 1988, Thompson was administered the WAIS-R, resulting in scores of 85 and 82. While the Wechsler Adult Intelligence Scale is an acceptable testing instrument, the early version, the WAIS-R is not based on "current intelligence theory" and is not supported "by clinical research and factor analytic results" making it a less reliable and valid testing measure than the WAIS-IV. Gordon E. Taub, PhD & Nicholas Benson, PhD, *Matters of Consequence: An Empirical Investigation of the WAIS III and WAIS IV and Implications for Addressing the Atkins Intelligence Criterion*, Journal of Forensic Psychology Practice, 13:27-48, 32 (2013). The WAIS-IV was the first test developed on these important factors making it the most reliable test available. Specifically, empirical data shows that the WAIS-IV is a more reliable instrument in measuring IQ as well as determining whether someone is intellectually disabled. *Id*. Therefore, a forensic psychologist should place greater weight on a WAIS-IV score than that of a WAIS-III (or WAIS-R) because the score is "more valid, reliable, and consistent with the publisher's theoretical model to measure intelligence . . ." *Id*. at 47.

Additionally, the WAIS-R was published in 1981 making it 6 and 7 years old at the time Mr. Thompson took the test. This means that Thompson's scores in 1987 and 1988 were compared to the results of the normative sample in 1981. This test date/norm mismatch, called the Flynn Effect, results in the inflation of scores of about "three points per decade." *Id*. As of 2014 there have been about 4,000 research articles on the Flynn Effect and the increase in IQ scores throughout the population over time. KEVIN S. MCGREW, AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, THE DEATH PENALTY AND INTELLECTUAL DISABILITY, 159 (Edward A. Polloway 2013). As a result, the test instruments have to be revised and re-normed on a regular basis. Taub & Benson, *supra*, at 29. The WAIS-IV Dr. Sultan administered in 2009 was published within a year of Thompson's evaluation.

because the accuracy of the tests themselves are improved over time, the most recent WAIS-IV test is the most accurate testing available (T. 98-99).[18] Thompson received a full-scale IQ score of 71 on the WAIS-IV. Sultan opined that considering the confidence interval, his true score is between 68-76. Just sixteen days after Sultan administered the WAIS-IV, Prichard administered a Stanford-Binet, Fifth Edition ("SB-5"), in which he claims Thompson received a full-scale score of 88. *Id*. at 59; (T. 198).

To explain the significance of the range of scores, Thompson sought to introduce intellectual disability expert Stephen Greenspan, Ph.D., however, the court excluded his testimony.

> At his initial intellectual disability hearing, Thompson attempted to introduce the testimony of intelligence testing expert, Dr. Greenspan, in the hope that the expert could more fully explain the range of Thompson's IQ scores in relation to his adaptive functioning, including how significant deficits in adaptive functioning can affect a full-scale IQ score. Thompson proffered that this evidence could have been used to counteract the seemingly high full-scale IQ score of 88 found by the State's expert, who admittedly never tested Thompson's adaptive functioning nor considered that information because of the bright-line cutoff of 70 announced in *Cherry*. However, this expert was excluded by the circuit court because he had not personally examined Thompson.

Thompson, 208 So. 3d at 59-60.

In its analysis of why Mr. Thompson's 2009 hearing failed to meet constitutional standards, the Florida Supreme Court expressly identified the refusal to allow Dr. Greenspan to testify as a factor in their conclusion stating that while it is:

> impossible to know the true effect of this Court's holding in *Cherry* on the circuit court's review of evidence presented at Thompson's intellectual disability hearing, particularly on Thompson's range of

[18] Notably, Dr. Prichard does not address or discuss how each revision of the Wechsler Adult Intelligence Scale improves the testing instrument, thereby providing for more accurate measures of a person's IQ score. Taub & Benson, *supra* note 17, at 46.

> IQ scores from 71 to 88[,] [w]hat is clear is that this court instructed the circuit court to conduct Thompson's intellectual disability hearing pursuant to *Cherry*."

Id. at 60.[19]

Without the proffered analysis from Dr. Greenspan, the court was in no position to properly analyze the claim.

> In sum, the United States Supreme Court has made clear that when determining whether an individual meets the criteria to be considered intellectually disabled, the definition that matters most is the one used by mental health professionals in making this determination in all contexts, including those "far beyond the confines of the death penalty." *Hall v. Florida*, 134 S. Ct. at 1993. As such, courts cannot disregard the informed assessments of experts. *Id*. at 2000.

Hall v. State, 201 So. 3d at 637.

This court must look at the prevailing science to understand the significance of testing throughout Thompson's life prior to determining whether he is eligible for the death penalty. That analysis has not been done in Mr. Thompson's case in spite of his timely and ongoing efforts to obtain a constitutional review of his claim.

iv. Dr. Prichard's score is invalid due to errors in the administration of the Stanford-Binet, Fifth Edition

As noted *supra*, Dr. Prichard administered the SB-5 to Thompson and obtained an IQ score of 88. Prichard relies on his score to opine that Thompson is not intellectually disabled. However, Prichard's score is invalid due to errors in the administration of the testing which are known to result in an elevated IQ score.

The Defense retained Gale Roid, Ph. D., the author of the SB-5 to review Prichard's 2009

[19] Dr. Greenspan completed a written report which was provided to the court in 2009 and again provided to this Court and the State in April of 2017.

testing.[20] Dr. Roid has more than 50 years of experience in Assessment Psychology, including the research and development of the SB-5. Roid discovered several red flags and errors which he opines renders Prichard's testing invalid and unreliable and results in Prichard's score being inflated by at least 12 points (*See* Report of Dr. Gale Roid, Jan. 17, 2020).

Prichard's testing is subject to challenge because he administered the SB-5 on Thompson within two weeks of Sultan administering IQ testing. Experts are aware, or should be aware, that best practices caution against administering the same or similar test within a year (Report of Dr. Gale Roid, Jan. 17, 2020, p. 4); *See also* AAIDD AD HOC COMMITTEE ON TERMINOLOGY AND CLASSIFICATION, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEM OF SUPPORTS (11th ed., American Association of Intellectual and Developmental Disabilities 2010) (1910). Because of the potential practice effect[21] of having taken another similar test a mere two weeks prior, Dr. Roid believes this alone may have inflated Prichard's score by nearly 5 points (Report of Dr. Gale Roid, Jan. 17, 2020, p. 5).

Additionally, Prichard failed to administer the test in a standardized manner. The SB-5 allows test administrators to begin at a chosen level when taking into consideration the test taker's base line functioning. By the time Prichard tested Mr. Thompson in 2009, several psychologists had testified on the record over the years as to Thompson's brain dysfunction and memory problems. Prichard had access to various IQ scores Thompson obtained, several of which are in the low 70's. And, Prichard was provided school records which clearly establish concerns about Thompson's intellectual abilities. Based on this information, Prichard should have started the test

[20] Mr. Thompson timely filed Dr. Gale Roid's report on January 17, 2020, however, the report is attached to this pleading for the Court's convenience. (*See* Attachment C).

[21] In his report, Dr. Roid details the similarities between the WAIS IV and the SB-5 intelligence tests and discusses the particular practice effect concerns (Report of Dr. Gale Roid, Jan. 17, 2020, p. 5).

and each subtest at lower levels than he chose. This error likely artificially inflated Thompson's overall SB-5 IQ score by approximately five points independent of the five-point inflation from the practice effect (Report of Dr. Gale Roid, Jan. 17, 2020, p. 4).

Additionally, Prichard's report noted little about the testing itself, a practice that Roid also identified as substandard:

> Dr. Prichard also discussed very little about the testing session in his final report, instead reviewing much of the background information and describing the test scores rather than stating the reasons for considering the testing session to be valid. It is professional and best practice to complete the behavioral section of the record form with confirmation of a valid testing session. In contrast, Dr. Sultan completed the test-session behavior of Mr. Thompson in a very thorough way after administering the WAIS-IV in 2009. Any test administration can be strongly affected by the cooperation, mood, health, vision, and other factors in the examinee's life at the time of testing.

(Report of Dr. Roid, Jan. 17, 2020, p. 9). Prichard's 2019 report is no more helpful and no more scientifically sound than his 2009 findings. The report covers impressions made in a limited interview, lacking any objective assessments.

At an evidentiary hearing, Mr. Thompson would be able to establish that he has significantly sub-average intelligence with an onset prior to the age of 18 existing with concurrent adaptive deficits. To grant the State's motion and reinstate an order based on an unconstitutional standard of proof that has been determined invalid by the Supreme Court of the United States presents an unacceptable risk that the State of Florida may execute a man categorically exempt from execution and calls into doubt the legitimacy of Florida's death penalty system.

III. THE FLORIDA SUPREME COURT'S RULING IN *PHILLIPS v. STATE* WILL RESULT IN A DEATH PENALTY SYSTEM THAT VIOLATES THE EIGHTH AMENDMENT PROHIBITION AGAINST ARBITRARY IMPOSITION OF THE DEATH PENALTY AND EQUAL PROTECTION OF THE LAWS

To deny Thompson the right to an evidentiary hearing where a court would apply the

standards set out in *Hall*, while other similarly situated capital defendants have been granted *Hall* relief, would violate Mr. Thompson's Fifth, Eighth and Fourteenth Amendment rights to equal protection of the laws, substantive and procedural Due Process, and the right to be free from the arbitrary imposition of the death penalty. "[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 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. See e.g. Herring v. State*, SC15-1562, 2017 WL 1192999 (Fla. March 31, 2017) (Finding that under *Hall*, Herring had previously established each element of the test of intellectual disability, vacating the death sentence, and reducing his sentence to life); *State of Florida v. Roger Cherry*, No. 1986-CF-04473 (Fla. 6th Cir. Ct. May 18, 2017) (Doc. No. 918); *Hall v. Florida*, 201 So. 3d 628, 638 (Fla. 2016) (Vacating sentence of death with instructions to enter a life sentence based on *Hall v. Florida*); and *State of Florida v. Sonny Boy Oats, Jr.*, No. 1980-CF-016 (Fla. 5th Cir. Ct. Feb. 13, 2020) (Doc. No 249, Joint Stipulation).

Mr. Thompson need not show that he would absolutely prevail – although there is powerful proof that he is intellectually disabled – at an evidentiary hearing for his rights to equal protection to be violated by the summary denial of his claim; being denied the opportunity to

present evidence, unlike others who were in a similarly situated posture, would violate his constitutional rights under the Fourteenth Amendment of the United States Constitution. Indeed, others who may have lost their claims were still given the opportunity to make a full presentation of the evidence in support of their claim.[22] Those defendants known to Thompson who were given the opportunity to make a full presentation to the circuit court based on *Hall* and/or *Walls* include: Joe Nixon, Leon County Case No. 1984-CF-02324; Leonardo Franqui, Miami-Dade County Case No. 1992-CF-06089 (on mandate from the Florida Supreme Court remanding for evidentiary hearing); Jerry Haliburton, Palm Beach County Case No. 1982-CF-001893 (same); Tavares Wright, Polk County 2000-CF-2727 (same); and Dean Kilgore, Polk County Case No. 1989-CF-686-A-0 (Mr. Kilgore died on death row on January 12, 2018 while pending evidentiary hearing by order of a mandate from the Florida Supreme Court). Franqui was remanded for further evidentiary development after Mr. Thompson.

There is no non-arbitrary, rational basis that could justify this Court ordering that Thompson – but not other similarly-situated defendants – be denied the benefit of *Hall*. Factors such as a busy court calendar, busy expert witness calendars, a global health pandemic, and the thorough presentation of related issues through motion practice and hearings, should not determine whether a capital defendant lives or dies. There is no meaningful difference between Thompson's case and those cases in which a capital defendant was able to press his claim under *Hall* at an evidentiary hearing, some of whom successfully obtained a life sentence. The death penalty "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally

[22] In *Smith v. Comm'r, Ala. Dep't of Corr.*, the Eleventh Circuit Court of Appeals acknowledged that a rule announced by the Supreme Court of the United States should still be given equal effect even where the rule "only guarantees the chance to present evidence in support of relief sought, not ultimate relief itself." 924 F.3d 1330, 1339, n.5 (2019), (citing *Montgomery v. Louisiana*, 136 S. Ct. 719 (2016)).

impermissible or totally irrelevant to the sentencing process.'" *Johnson v. Mississippi*, 486 U.S. 578, 584–85 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884–885, 887 n.24 (1983)). To deny Mr. Thompson the benefit of *Hall* would violate his right to equal protection of the law under the Fourteenth Amendment to the United States Constitution. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)). The unevenness that would flow from applying *Phillips* to Thompson would flout the fundamental fairness interests enshrined in the Fourteenth Amendment's concept of Due Process. *See Carmell v. Texas*, 529 U.S. 513, 533 (2000) (holding "there 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.").

IV. THE FLORIDA SUPREME COURT'S DECISION IN *PHILLIPS V. STATE* AMOUNTS TO AN EX POST FACTO CHANGE IN THE LAW

To apply the Florida Supreme Court's ruling in *Phillips* to Thompson would amount to an unconstitutional ex post facto application of the law. Article I, § 10 of the federal Constitution prohibits state ex post facto laws. *See*, *e.g.*, *Weaver v. Graham*, 450 U.S. 24 (1981); *Lindsey v. Washington*, 301 U.S. 397 (1937). Federal Due Process erects the same prohibition against state judicial action. *Bouie v. City of Columbia*, 378 U.S. 347 (1964):

> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id*. at 353-354. *See also Marks v. United States*, 430 U.S. 188 (1977).

Bouie notes the thematic connection between the prohibition of ex post facto liability and the doctrine of vagueness, citing Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND.

L. REV. 533, 541 (1951), and Anthony G. Amsterdam, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 73-74, n. 34 (1960). *See State v. Ramseur*, No. 388A10, 2020 WL 3025852 (N.C. June 5, 2020). It is true that one of the traditional concerns of both the Ex Post Facto Clause and the void-for-vagueness precept – the danger of punishing an individual for acts which s/he had no notice would be criminal – is inapplicable here. But that is not the only concern of either doctrine. Both also stand to protect against malleable legal rules which "inject[ ] into the governmental wheel so much free play that in the practical course of its operation it is likely to function erratically – responsive to whim or discrimination . . . ." Amsterdam, *supra*, at 90. 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, (1798) (opinion of Justice Chase). 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).[23]

[23] There is another as well:

> The counsel for Missouri closed his argument in this case by presenting a striking picture of the struggle for ascendency in that State during the recent Rebellion between the friends and the enemies of the Union, and of the fierce passions which that struggle aroused. It was in the midst of the struggle that the present constitution was framed, although it was not adopted by the people until the war had closed. It would have been strange, therefore, had it not exhibited in its provisions some traces of the excitement amidst which the convention held its deliberations.
>
> It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. In *Fletcher v. Peck* [10 U.S. 87, 137-138], Mr. Chief Justice Marshall, speaking of such action, uses this language: 'Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of

In *Calder*, "Justice Chase explained that the reason the Ex Post Facto Clauses were included in the Constitution was to assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legislation." *Miller v. Florida*, 482 U.S. 423, 429 (1987). No lesser restraint is imposed upon state judicial action by the ex post facto component of federal Due Process.

V. THE FLORIDA SUPREME COURT ERRED IN HOLDING THAT *HALL* ANNOUNCED A NEW NON-WATERSHED RULE OF FEDERAL EIGHTH AMENDMENT LAW FOR PURPOSES OF *TEAGUE V. LANE* AND *WITT V. STATE*

The Florida Supreme Court's May 21, 2020 holding in *Phillips* - that *Hall* announced a new non-watershed rule of federal Eighth Amendment law for purposes of *Teague v. Lane*[24] and *Witt v. State*[25] - was error. The court's holding violates *Witt* and *Teague*. As the Florida Supreme Court has stated:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.

Witt v. State, 387 So. 2d 922, 925 (Fla. 1980) (internal quotations and citations omitted). But this is precisely what the court has done in holding in *Phillips* that *Hall* announced a new, non-

> those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State.'

Cummings v. Missouri, 71 U.S. 277, 322 (1866).

[24] 498 U.S. 288 (1989).

[25] 387 So. 3d 982 (Fla. 1980).

watershed rule of law for Eighth Amendmentpurposes. The holding in *Phillips* raises a grave risk that Florida will execute intellectually disabled capital defendants. The determination that *Hall* announced a new non-watershed rule was error. *See Bousley v. United States*, 523 U.S. 614, 620 (1998); *Montgomery v. Louisiana,* 136 S. Ct. 719 (2016) .

VI. *PHILLIPS V. STATE* IS PREDICATED UPON AN ERRONEOUS UNDERSTANDING OF THE DECISION IN *HALL V. FLORIDA*

Mr. Thompson was initially denied the relief to which he was entitled under *Atkins v. Virginia,* because this Court followed the unconstitutional interpretation on Florida's intellectual disability statute established in *Cherry*. *Thompson v. State*, SC09-1085, 41 So. 3d 219, *1 (Fla. 2010) (unpublished table opinion) (". . . we hold that there is competent, substantial evidence to support the circuit court's factual findings that Thompson is not mentally retarded, based on this Court's definition of the term as set forth in *Cherry.*"); *see also Hall v. State*, 109 So. 3d 704, 708 (2012) ("In *Cherry . . . we determined the proper interpretation of section 921.137*." (emphasis added));

The Supreme Court of the United States' effective overruling of *Cherry* did not hold Florida's intellectual disability statute itself unconstitutional, it merely held that *Cherry*'s glossing of the statute was federally impermissible. In consequence, this Court must now apply the statute without the *Cherry* gloss. Decisions explicating statutes favorably to criminal defendants are – and as a matter of federal constitutional due process and equal protection must be – applied retroactively. *See Bousley v. United States*, *supra*, at 620-621; *Schriro* v. *Summerlin*, 542 U.S. 348, 351 (2004) (distinguishing "decisions that narrow the scope of a criminal statute by interpreting its terms" from "constitutional determinations"). Ignoring this point, the *Phillips* decision of May 21, 2020 confuses statutory interpretation with constitutional innovation.

VII. THE FLORIDA SUPREME COURT'S DECISION TO RECEDE FROM *WALLS* IN *PHILLIPS V. STATE* DOES NOT AFFECT THE RETROACTIVE APPLICATION OF *HALL V. FLORIDA* TO MR. THOMPSON.

In an effort to fit Thompson's case neatly under the purview of *Phillips*, the State misapprehended the underpinnings of the Florida Supreme Court's remand in Thompson's case The State asserts that the "remand was *solely* based on the Florida Supreme Court's opinion announced in *Walls v. State*, 213 So.3d 340 (Fla. 2016) that *Hall v. State*, 572 U.S. 701 (2014) was retroactive." (State's Mtn., June 19, 2020, p. 1) (emphasis added).

But, as set out *supra* and below, the Florida Supreme Court found Mr. Thompson is entitled to a constitutionally sound hearing notwithstanding the retroactivity determination in *Walls*,

> Because the trial court and this Court relied, in part, on the now invalid bright-line cutoff of an IQ score of 70 in denying Thompson relief, we have determined that Thompson should receive the benefit of *Hall*. **Not only have we determined that *Hall* is retroactive utilizing a *Witt* analysis, *Walls v. State*, 2016 WL 6137287 (Fla. Oct. 20, 2016), but to fail to give Thompson the benefit of *Hall*, which disapproved of *Cherry*, would result in a manifest injustice, which is an exception to the law of the case doctrine**. *See State v. Owen*, 696So. 2d 715, 720 (Fla. 1997) ("[t]his Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case" and that "[a]n intervening decision by a higher court is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case"). Because Thompson's eligibility or ineligibility for execution must be determined in accordance with the correct United States Supreme Court jurisprudence, **this case is a prime example of preventing a manifest injustice if we did not apply *Hall* to Thompson**. Accordingly, we reverse the summary order denying relief and remand to the trial court for a new evidentiary hearing on intellectual disability pursuant to the United States Supreme Court's holding in *Hall* and this Court's holding in *Oats.*

Thompson v. State, 208 So. 3d 49, 50 (Fla. 2016) (emphasis added). The court sent Thompson's case back to this court for evidentiary development to prevent the manifest injustice which would

occur if Thompson were denied the opportunity to present evidence of his intellectual disability and have that evidence analyzed in conformity with the accepted standards of the medical community. The decision regarding *Walls* and retroactivity does not nullify the Florida Supreme Court's recognition and holding that to deny Mr. Thompson an evidentiary hearing under the *Hall* standards would be a manifest injustice.

VIII. *HALL V. FLORIDA* APPLIES TO MR. THOMPSON BECAUSE HIS CASE IS NOT YET FINAL, AND THEREFORE, ANY DECISION TO RECEDE FROM RETROACTIVITY IN *WALLS* IS NOT DISPOSITIVE.

Under Florida's statutory scheme, when a defendant raises intellectual disability as a bar to execution and makes a prima facie showing that he might be intellectually disabled, a death sentence may not be imposed unless the judge conducts an evidentiary hearing and concludes that the defendant failed to prove intellectual disability. If, after an evidentiary hearing, the judge denies the claim and imposes a death sentence, defendant is entitled to an appeal. The death sentence in those circumstances is not final until the Florida Supreme Court affirms the circuit court's denial of the intellectual disability claim.

In 2016, the Florida Supreme Court determined that an evidentiary hearing was required on Mr. Thompson's intellectual disability claim. *Thompson v. State*, 208 So. 3d 49 (Fla. 2016). Under Florida Statutes section 921.137, Thompson cannot be subject to a death sentence until a judge has heard the evidence of his intellectual disability and rejects the defense under constitutionally appropriate standards. Further, any death sentence is not final until the Florida Supreme Court has reviewed the judge's rejection of the intellectual disability defense.

In *Card v. Jones*, 219 So. 3d 47 (Fla. 2017), Card was convicted of murder committed on June 3, 1981, and his conviction and death sentence were affirmed on direct appeal and became on November 5, 1984. *Card v. State*, 453 So. 2d 17 (Fla. 1984); *Card v. Florida*, 469 U.S. 989

(1984). Following the denial of his 3.850 motion and two petitions for a writ of habeas corpus, Card filed a successive 3.850 motion presenting a claim that after the jury had recommended death, the judge had the State draft the sentencing order defense counsel's knowledge. The lower court summarily denied, but on appeal, the Florida Supreme Court remanded for an evidentiary hearing. *Card v. State*, 652 So. 2d 344, 345 (Fla. 1995).

Card prevailed and the circuit court ordered a new penalty phase proceeding; the State did not appeal. The Florida Supreme Court did not consider Card's death sentence final until the new penalty phase was complete, a sentencing order in compliance with the statute entered, and the direct appeal concluded. *Card v. State*, 803 So. 2d 613 (Fla. 2001). Because the U.S. Supreme Court did not deny certiorari review until June 28, 2002, the Florida Supreme Court determined that Card's death sentence was not final until that date. *Card*, 219 So. 3d at 48.

Under the same logic, Mr. Thompson's death sentence is not yet final. *See* Fla. R. Crim. Pro. 3.203(e). This is consistent with the logic of and holding in *Jimenez v. Quarterman*, 555 U.S. 113 (2009), a case where a defendant's direct appeal from his burglary conviction had been dismissed in 1996, but the appellate court in 2002 granted the defendant the right to file an out-of-time appeal. The U.S. Supreme Court held that the burglary conviction was not final until the out-of-time appeal was denied. *Id.* at 120.

The Florida Supreme Court has held that Thompson had made a prima facie showing of intellectual disability such that an evidentiary hearing and written findings were required. Under Florida Statutes section 921.137 and Florida Rule of Criminal Procedure 3.203, because this court must make a determination as to his eligibility of the death penalty, Mr. Thompson's case is still pending.

WHEREFORE, Mr. Thompson respectfully requests this Court deny the State's Motion to Reconsider and to follow the Mandate of the Florida Supreme Court commanding this Court

to hold an evidentiary hearing on his intellectual disability claim.

Respectfully Submitted,

/s Marie-Louise Samuels Parmer
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been delivered to all parties by electronic service using the Florida E-portal on this 28th day of July, 2020.

/s/ Brittney Nicole Lacy
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**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff, **Case No.: 76-3350B**

v.

WILLIAM LEE THOMPSON,
Defendant.

ATTACHMENTS TO DEFENDANT'S RESPONSE TO STATE'S MOTION FOR RECONSIDERATION AND MOTION TO CANCEL DEFENDANT'S MANDATED EVIDENTIARY HEARING AND DENY HIS MOTION FOR POSTCONVICTION RELIEF

A. Report of Dr. Robert Ouaou, June 23, 2017

B. Chart of William Thompson's IQ Scores

C. Report of Dr. Gale Roid, January 17, 2020

ATTACHMENT A

FORENSIC NEUROPSYCHOLOGICAL/ADAPTIVE BEHAVIOR EVALUATION

NAME: WILLIAM THOMPSON
AGE: 65
EDUCATION: 9 years
DATE OF BIRTH: 02/19/1952

DATE OF REPORT: 06/23/2017

DATE(s) OF EXAM: 04/27/2017, 4/28/2017, 4/16/2015

ADAPTIVE BEHAVIOR EVALUATIONS:

BILL WEAVER: 03/01/2017
DONNA ADAMS: 04/04/2017, 7/27/2015

IDENTIFYING INFORMATION

William Thompson is a 65-year-old, right-handed, Caucasian male who was referred by defense counsel. Mr. Thompson has undergone intelligence testing on multiple occasions since elementary school and the results unequivocally placed him in the intellectually impaired (ID) range prior to age 18. However, his history lacks a formal assessment of adaptive functioning that is necessitated by IQ scores in the ID range as well as historical evidence of abnormal functioning prior to age 18. Therefore, I conducted several formal and informal evaluations of the examinee's adaptive functioning prior to age 18. Additionally, a neuropsychological test battery was administered in order to determine whether he suffered from any cognitive deficits. The examinee was made aware of the nature of this evaluation. He was told that he was waiving his rights to confidentiality, and that I have been authorized to provide an evaluation, not treatment. He was also made aware that I would be reviewing relevant records and possibly speaking with third party sources. The examinee was evaluated in a private exam room that was free from visual or auditory distractions at Union Correctional Institution.

RECORDS REVIEWED

REPORTS AND TESTIMONY: EXPERT WITNESSES

Stephen Greenspan, Ph.D. (2009 Report; 2009 Testimony)
Faye E. Sultan, Ph.D. (2009 Preliminary Psychological Evaluation Summary and Raw Test Data)
Gregory A. Prichard, Psy.D. (2009 Raw Test Data; 2009 Testimony)
Joyce Lynn Carbonell, Ph.D. (1987 Report; 1988 Letter to Judge Capua; Deposition; Notes)
Dorita R. Marina, Ph.D. (1988 Report and Notes; 1989 Testimony)

Dennis F. Koson, M.D. (1988 Deposition; 1987 Report)
Arthur Stillman, M.D. (1989 Testimony; 1984 Report)
Attorney Louis Jepeway (1989 Testimony)
George Barnard, M.D. (1982 Report)
Albert C. Jaslow, M.D. (1976 Report)
A.M. Castiello, M.D. (1976 Report)
Charles Mutter, M.D. (1976 Report)
William Corwin, M.D. (1976 Report)

TESTIMONY AND AFFIDAVITS: LAY WITNESSES
Bill Weaver (1987 Affidavit; 1989 Testimony)
Donna Adams (1987 Affidavit; 1989 Testimony)
Barbara Savage Garritz (1987 Affidavit; 1989 Testimony)
Harvey Lescalleet (1989 Deposition)
Arland Rogers (1989 Deposition)
Ruth Williams (1989 Testimony)
Hazel Rogers (1989 Testimony)

OTHER RECORDS
Academic Records
Transcripts from 2009 Evidentiary Hearing
Military Records
FDOC Educational and Medical Record Excerpts
Statement of William Thompson (1976)
William Thompson Testimony (1978)
Surace Indictment and Plea
Surace Criminal History
Surace FBI File

THIRD PARTY INTERVIEWS (Relationship)
Donna Adams (ex-wife)
Bill Weaver (school teacher/Director of Special Education for the Licking Valley)
School District/principal)
Helen Thompson (mother)
Donna Wills (childhood neighbor; school staff)
Don Wills (childhood neighbor)
Glen Anderson (childhood compatriot)

RELEVANT HISTORY
William Thompson has a childhood history of low IQ, poor academic achievement, and subsequent low functioning as a young adult prior to being incarcerated at age 24. Because of problems with new learning and attention, Mr. Thompson has undergone multiple IQ evaluations that have been consistent with intellectual disability. However, until this current report, there has been no

formal assessment of adaptive functioning despite testimony from individuals that knew him prior to age 18 that indicated low functioning. The first IQ test occurred at age 6 (6/11/1958) when he was administered the Stanford-Binet Intelligence Test and achieved a score of 75. He was subsequently diagnosed as "at least mildly retarded" by the school psychologist. He was administered the Stanford-Binet Intelligence Test by a different school psychologist in 2nd grade (5/11/1961) and achieved a score of 74, replicating the previous testing. It was noted that his lowest areas of functioning were in tests related to reasoning ability, comprehension, and visual spatial construction abilities. Again, he was classified as being "mildly retarded" and eligible for special class placement. He was administered the Stanford Binet Intelligence Test again in 2009 by Dr. Prichard while incarcerated. Inconsistent with scores on this test prior to age 18, he scored in the low average range (88). Mr. Thompson was evaluated regularly for mental retardation in elementary and middle school. In addition to the two exams above, he was administered the California Test of Mental Maturity (CTMM) in 1958, 1959, and 1963. He achieved IQ scores of 74, 90, and 79, respectively. He was also administered the Henmon Nelson Tests of Mental Ability as a child in 1963 and 1966, achieving IQ scores of 73 and 70, respectively. Other intelligence testing occurred after Mr. Thompson during his current incarceration and was conducted with the Wechsler Adult Intelligence Scale-Revised Edition (1987 & 1988) and Wechsler Adult Intelligence Scale-Fourth Edition (2009). His score on the WAIS-R were 85 and 82; his score on the WAIS-IV was 71. It should be noted that Dr. Prichard's IQ test administration was conducted only 20 days after underwent IQ testing with the WAIS-IV, likely leaving his IQ score of 88 vulnerable to frank practice effects. Additionally, the Flynn Effect was not taken into account, which would have further affected the 2009 IQ score. Practice effects likely also caused an artificially higher CTMM score of 90 in 1959. Regardless, prior to age 18 and into adulthood, William Thompson has demonstrated IQ scores in the impaired ranges.

MEDICATIONS
Zantac
Aspirin
Tylenol

PAST MEDICAL HISTORY
The examinee suffers from Wilson's disease and arrhythmia. He described a history of cardiac stents that were placed in 2014. Additionally, there is mention that his father physically abused him as a child. Evidently, Mr. Thompson suffered from tics as a child and was beaten when these tics were displayed.

DEVELOPMENTAL/SOCIAL HISTORY
A review of school records from Licking Valley revealed that William did not do well academically. He repeated 1st and 8th grade and was finally placed into 9th

grade (not promoted), was enrolled in speech and hearing therapy in 1st grade, and noted to have significant attention and learning problems. Multiple IQ test scores during grade school were in the mid 70's. According to teacher, principal, and Director of Special Education for the Licking Valley School District, Bill Weaver, there were no formal special education classes at the time and William was placed in classes with the lowest functioning students who required special instruction. These classrooms were labeled "modified class" and were known as an informal classroom for "EMR" or educable mentally retarded. Achievement testing during grade school revealed results that were well below expected grade level. William did not have any excessive demerits related to poor conduct. In fact, he was reported to be excessively pleasing by teaching staff. Additionally, he had very little absences from school. Mr. Weaver was also a basketball coach at the school and noted that William was very poorly coordinated and clumsy. Helen Thompson, William's mother, reported that he was a slow learner, couldn't read, and was "entirely different" than her other children. She stated that he required structure and direction to dress and perform daily hygiene tasks, could not manage money, and did not play games like her other children. According to his childhood compatriot, Glen Anderson, William was "slow", was bullied by other children, and was in a special education class. Mr. Thompson was 18 years old during 9th grade when he dropped out of school. He never had a driver's license and stated that he had several jobs that included construction, security guard, and carnival worker. The duties of each of these jobs required minimal effort.

PROCEDURES

ADAPTIVE FUNCTIONING

A formal adaptive behavior skills evaluation was conducted with two informants who were familiar with the examinee's behavior and functioning prior to age 18. Much of the assessment was retrospective utilizing the **Adaptive Behavior Diagnostic Scale** or **ABDS** (2016). The ABDS meets the contemporary standards for standardization, reliability, and validity in the measurement of adaptive behavior. The primary function of the ABDS is to establish the presence and magnitude of adaptive behavior deficits. The ABDS scores are consistent with the DSM-V and American Association on Intellectual and Developmental Disorders (AAIDD) definitions of intellectual disability. In addition to formal assessment, several interviews were conducted with individuals who were familiar with Mr. Thompson's functioning prior to age 18.

COGNITIVE ASSESSMENT

The patient was administered a battery of neuropsychological tests. Tests that are currently available are highly accurate, standardized instruments. They are validated through clinical trials, adhering to stringent, objective measures. Neuropsychological tests provide quantifiable results that indicate the amount of

deviation from base-line norms. Through a comparison of patient responses to established norms, the clinician can determine the scope and severity of cognitive impairments. This data can provide information leading to the diagnosis of a cognitive deficit or to the confirmation of a diagnosis, as well as to the localization of organic abnormalities in the central nervous system (CNS). The following tests were administered:

Measures of Symptom Effort/Malingering:
Test of Memory Malingering (TOMM)
California Verbal Learning Test – 2nd Edition (CVLTII) Forced Choice
WAIS-IV Embedded Measures (e.g. reliable digits)
ACS Effort Test
Rey 15-item Test
Green's Medical Symptom Validity Test

Measures of Cognitive/Intellectual Functioning:
ACS Test of Premorbid Functioning (TOPF)
Wechsler Memory Scale - Fourth Edition (WMS-IV)
- Logical Memory I
- Logical Memory II
- Visual Reproduction I
- Visual Reproduction II`

California Verbal Learning Test – 2nd Edition (CVLT-II)
Delis Kaplan Executive Function System (D-KEFS)
- Trail Making Test
- Design Fluency Test
- Verbal Fluency Test
- Color Word Interference Test
- Tower Test
- Proverbs Test

Boston Naming Test
Wisconsin Card Sorting Test (WCST)
Rey Complex Figure Test (RCFT) Copy and Memory Test

EXAMINATION RESULTS

ADAPTIVE FUNCTIONING ASSESSMENT SUMMARY

Mr. Thompson's scores on both administrations of the ABDS reflected severely impaired adaptive functioning overall and in all three domains of the ABDS (Conceptual, Social, and Practical). Scores on all scales were at or below the 1st percentile and consistent with extremely low functioning. There were consistent findings between the two individuals assessed (Ms. Adams and Mr. Weaver) on the ABDS that reflected reliable responding. Additionally, Ms. Adams completed the Vineland II Adaptive Behavior Scales Rating Form. Her responses on this instrument were consistent with scores from the ABDS.

Additionally, interviews with multiple third party sources and testimony reflected observations and opinions consistent with diminished adaptive functioning prior to the age 18. Mr. Thompson was reported to be slower than others, a follower, had poor hygiene, was oddly dressed, clumsy, overly pleasing, teased and bullied for being different.

COGNITIVE FUNCTIONING SUMMARY

SYMPTOM VALIDITY/MALINGERING

When testing subjects who are accused of crimes, there is the possibility that they may try to exaggerate their cognitive and psychiatric impairments. In order to determine if this was the case I administered tests that are designed to reveal less than genuine performance on the part of the test subject. On multiple tests of effort and motivation the examinee performed within normal limits. Thus, the current evaluation is considered to be a valid profile of the examinee's neuropsychological functioning.

ESTIMATION OF PRE MORBID LEVEL OF FUNCTION

A verbal reading task (TOPF) designed to estimate an individual's intellectual ability prior to any type of neurological disease or insult was utilized. Pre morbid level of ability was estimated by assessing his ability to pronounce irregularly spelled words taken. Based on his performance, his predicted full-scale WAIS-IV score was 74 (impaired range).

ATTENTION CONCENTRATION

Immediate Memory Span: The examinee demonstrated impaired performance on measures of immediate memory. His recall of the initial list of words from the CVLT-II was in the impaired range relative to age-matched peers. His recall of a 2nd, interference list, was in the low average range.

Focused & Flexible Attention: Completion time for tasks requiring motor speed, sequencing, and visual search were in the average range compared to age and education matched peers. When these tasks were made more complex by requiring that he alternate cognitive set, he performed within the average range.

LEARNING/MEMORY

WMS-IV Index Scores

Auditory Memory	7th percentile; Impaired
Visual Memory	30th percentile; Average
Immediate Memory	6th percentile; Impaired
Delayed Memory	16th percentile; Low Average

Acquisition of New Information
Total list learning on the CVLT-II was in the mildly impaired range compared to age matched peers. Initial learning of the list was significantly impaired.

Story Learning from the WMS-IV was in the moderately impaired range relative to age-matched peers.

Figure Learning on the WMS-IV was in the average range relative to age-matched peers.

Recall
Word-list recall following brief and long delays was in the average range. Story recall from the WMS-IV was in the moderately impaired range.

Figure recall from the WMS-IV was in the average range relative to age and education matched peers.

Recall memory from the Rey Complex Figure Test was average at short delay and long delay recall conditions.

LANGUAGE
Confrontation naming and verbal fluency measures were in the average ranges.

SPATIAL ANALYSIS/SYNTHESIS
His ability for visuospatial praxis on the Rey Complex Figure was poor.

REASONING/PROBLEM SOLVING/EXECUTIVE FUNCTIONS
Executive functions are those neuropsychological processes that allow an individual to plan, initiate, program, sequence, and maintain goal-directed behavior, especially under novel circumstances. These complex cognitive functions also allow an individual insight into the intent of their behavior. Executive functions allow an individual to alter her/his behavior in order to meet the demands of a task or inhibit nonproductive behavior. Executive functions are affected by global traumatic brain injury as well as focal injuries to the frontal lobes of the brain.

His performances on several subtests of the Delis Kaplan Executive Function System (DKEFS) were significantly impaired (Color-Word Interference Inhibition/Switching, Proverbs Tests, and Tower Test). He showed impairment on subtests of the Wisconsin Card Sorting Test.

SUMMARY OF FORMAL ASSESSMENTS
William Thompson is a 65-year-old male who completed a comprehensive neuropsychological test battery over multiple sessions. On this examination, the

examinee put forth maximum effort on measures associated with malingering or feigning cognitive impairment (i.e. measures of memory, attention, executive functions). He passed all indicators that he was giving genuine effort and the results are considered to be a valid and comprehensive summary of his intellectual and cognitive functioning.

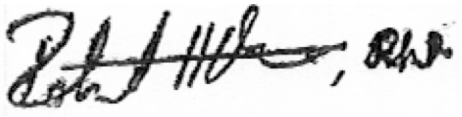
William exhibited a host of cognitive deficits that are normally found in patients with developmental disabilities and related neurological defects. He exhibited significant impairments on several tasks related to frontal lobe/executive functioning, learning, and memory.

Formal adaptive behavior assessment utilizing the ABDS and Vineland-II revealed that William suffered from significant adaptive behavior deficits prior to age 18. The presence and extent of William's adaptive behavior deficits were further confirmed by multiple independent interviews and testimony of individuals who knew him prior to age 18.

FORMULATION

William Thompson has a significantly impaired intellect with related cognitive deficits and poor adaptive functioning prior to age 18. A review of previous IQ scores (especially prior to age 18) revealed that Mr. Thompson's full-scale IQ scores fell in the impaired range (low to mid 70s). Taking into account standard error of measurement, it is opined that IQ tests repeatedly demonstrated he satisfies the first prong the statute relating to sub average intelligence. According to the American Association on Intellectual and Developmental Disabilities (AAIDD), intellectual disability (previously known as mental retardation) originates before the age of 18, and is characterized by significant limitations in both intellectual functioning and adaptive behavior. Based on the current assessments, review of records, and interviews with multiple sources, there is overwhelming evidence, both objective and reported, that William Thompson had significant adaptive functioning deficits prior to the age of 18.

These opinions are given with a reasonable degree of psychological certainty.



Robert H. Ouaou, Ph.D.
Florida Licensed Psychologist (PY6868)
Neuropsychology

ATTACHMENT B

INTELLIGENT QUOTIENT TESTING OF WILLIAM THOMPSON

Testing dates	Administrator	Test used	Findings	Score
June 11, 1958	School psychologist	Stanford-Binet	"at least mildly retarded"	**75**
Oct. 16, 1958	School psychologist	Cal. M.M.		**74**
Nov. 03, 1959	School psychologist	Cal. M.M.		**90**
May 11, 1961	School psychologist	Stanford-Binet	"mildly retarded"	**74**
Nov. 08, 1963	School psychologist	Cal. M.M.		**79**
Nov. 18, 1966	School psychologist	Henmon-Nelson	Form A, in 7th Grade	**73**
October 1968	School psychologist	Henmon-Nelson	Form A, in 8th Grade.	**70**
June 17, 1987 June 22, 1987	Joyce Carbonell, Ph.D.	WAIS-R	"dull normal range"	**85**
Nov 2-4, 1988	Dorita Marina, Ph.D.	WAIS-R	"lower half of below average range"	**82**
March 20, 2009	Faye Sultan, Ph.D.	WAIS-IV	"meets the diagnostic criteria for mental retardation"	**71**
April 6, 2009	Gregory Prichard, Ph.D.	Stanford-Binet	"low average range"	**88**

Wechsler Adult Intelligence Scale:

WAIS IV: published in 2008, Verbal comprehension index, perceptual reasoning index, working memory index, processing speed index. First test "developed using a 'new framework [that] is based on current intelligence theory and supported by clinical research and factor-analytic results.'" Gordon E. Taub, PhD & Nicholas Benson, PhD, *Matters of Consequence: An Empirical Investigation of the WAIS III and WAIS IV and Implications for Addressing the Atkins Intelligence Criterion*, Journal of Forensic Psychology Practice, 13:27-48, 32 (2013).

WAIS III: published in 1997, verbal, performance & full scale IQ (four secondary indexes: verbal comprehension, working memory, perceptual organization & processing speed)

WAIS-R: published in 1981, six verbal and five performances subtests (verbal: information, comprehension, arithmetic, digit span, similarities and vocabulary. Performance: picture arrangement, picture completion, block design, object assembly and digit symbol).

WAIS: initially created as a revision of the Wechsler-Bellevue Intelligence Scale (WBIS) which was a battery test published by Wechsler in 1939.

Variations of WAIS

WAIS IV – for 16-90 years, WISC [Wechsler Intelligence Scale for Children] administered for those under 16, WPPSI for those 2.5-7 years. (5 versions, most recent being the fall of 2014)

WAIS III abbreviated version sometimes used [4 subtest batteries] for estimates.

WASI [Wechsler Abbreviated Scale of Intelligence] also used as an estimate.

Flynn: add .33 per year for each year after test published. KEVIN S. MCGREW, AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, THE DEATH PENALTY AND INTELLECTUAL DISABILITY, 159 (Edward A. Polloway 2013); *see also* Gordon E. Taub, PhD & Nicholas Benson, PhD, *Matters of Consequence: An Empirical Investigation of the WAIS III and WAIS IV and Implications for Addressing the Atkins Intelligence Criterion*, Journal of Forensic Psychology Practice, 13:27-48, 32 (2013).

ATTACHMENT C

Dr. Gale H. Roid, Ph.D., ABAP

1209 E Street, Independence, OR 97351 galeroid@gmail.com

FINAL REPORT

Report on Intelligence Testing of William Lee Thompson

TO: Capital Collateral Regional Counsel-South,
Ft. Lauderdale, FL 33301

DATE: January 17, 2020

RE: Report on the methods and results of intelligence tests for the case concerning William Lee Thompson, Death Row inmate in Florida.

BACKGROUND

On April 7th, 2019, I was contacted by the Capital Collateral Regional Counsel-South (CCRC-S) in Ft. Lauderdale, Florida concerning the case of Mr. Thompson. The purpose of the contact was to request a study of the testing of Mr. Thompson's intellectual abilities for the purpose of establishing his standing relative to the "Atkins" ruling (the issue of possible mental retardation at the time of the crime). Subsequently, I was contracted to examine background information and the various assessments of intelligence for Mr. Thompson. I then conducted a study of the information provided to me on Mr. Thompson. This included a long history of his testing results (for intelligence and other concerns) going back to elementary school. This history has been described in detail in the background materials given to me (see list below). Because my specialty is psychological and educational assessment (clinical testing, test development, and statistical processes of validating tests—the field of Psychometrics), I will be concentrating on the accuracy of the clinical testing for intellectual abilities, both methods and results. Of special concern was the administration in 2009 of the Stanford-Binet Intelligence Scales—Fifth Edition (SB5)[i] by Gregory Prichard, PsyD, a Clinical and Forensic Psychologist in Bristol, Florida. Also, the testing of Dr. Faye Sultan using WAIS-IV in 2009 and other IQ estimates from Mr. Thompson's long history of assessments. The test results discussed by the psychologists appear to be central to the possible identification of Mental Retardation in Mr. Thompson. The current preferred label for mental retardation is now Intellectual Disability as defined by the American Association on Intellectual and Developmental Disabilities--AAIDD[ii] (2010) and the American Psychiatric Association's Diagnostic Criteria (2013, DSM-5).

MY QUALIFICATIONS

Education and Academic Work Experience. For more than 50 years, my specialty has been Assessment Psychology which includes research on the construction of tests ("psychometrics" and specialized statistics), the development of published tests, and the clinical administration, interpretation, and application of tests in Psychology and Education. Relevant to the Thompson case, I am the author of the Stanford-Binet Intelligence Scales—Fifth Edition (SB5, Roid, 2003a) and other published tests[iii]. My work has been recognized internationally[iv] and by the American Psychological Association (as Fellow—the highest designation, Division 5 on Measurement), the American Educational Research Association (as Inaugural Fellow), and the American Board of Assessment Psychology (with an Inaugural Diplomate status). My training and experience began at Harvard University, Cambridge, Massachusetts, earning a bachelor's degree in Social Psychology. I also worked as an undergraduate research assistant scoring tests for Dr. David McClelland, author of the "Need for Achievement" theory. I earned a master's degree and PhD in Assessment Psychology at the University of Oregon (an APA approved psychology program). At Oregon, I also worked at the Oregon Research Institute with some of the nation's experts on psychometrics, test construction, and clinical testing, especially Dr. Lewis R. Goldberg, my doctoral supervisor. Subsequently, I held Professorships at McGill University, Montreal, Canada, Western Oregon University (Teaching Research Division), and George Fox University (Clinical Psychology, PsyD Program). My work included conducting research on tests and assessment in Special Education and teaching assessment and research. I was selected for an interim position as the Lloyd Dunn Endowed Professor in Educational Assessment at Vanderbilt University in 2003. This was followed by a Professorship at Southern Methodist University (SMU) where I was Director of the Doctoral Program in the School of Education, teaching both psychology and education graduate students and conducting clinical assessments in a community outreach program. My publications (mostly on assessment) include 13 published tests or test manuals, 2 books, 14 chapters in assessment books edited by colleagues, 30 refereed research articles, and 90+ conference or workshop presentations (including more than 20 training workshops for SB5 for psychologists and special education professionals).

Work Related to Test Development and Clinical Testing. Between my academic positions, I worked in the test-publishing industry and as a consultant to test developers, and clinical assessment specialists. My first test-publishing position was Director of Research for Western Psychological Services (WPS, 1980-85), a psychological test publishing company in West Los Angeles. Over the 5 years at WPS, I helped to publish more than 20 tests, coordinating with test authors, editing, conducting statistical studies, and writing technical manuals. Examples include the *Tennessee Self Concept Scale* and the *Structure of Intellect Learning Abilities Tests*. My work became highly relevant to the Thompson case beginning in 1987 when I was hired by the Psychological Corporation in their test construction division (now Harcourt Assessment/Pearson) in San Antonio, TX. I was Senior Project Director (and later, Consultant)

for the Wechsler Intelligence Scale for Children—Third Edition (WISC-III), the Wechsler Individual Achievement Test (WIAT-1), and the beginning plans for the Wechsler Adult Intelligence Scale—Third Edition (WAIS-III). Thus, I have the privilege of having extensive knowledge of both the WISC/WAIS series of IQ tests and the Stanford-Binet. The preparation for publishing a major, widely used test such as these IQ instruments involves many years of research. The research steps include research on cognitive theories, development of items for the tests, collecting data on various tryout of new tests, training of groups of nation-wide examiners, and, often, a final year of statistical studies and writing of examiner and technical manuals to accompany the tests. The development of the SB5, for example, took seven years to complete (1996 to 2003). Authors of each test, such as myself, become experts in the administration, scoring, and interpretation of each test published by the end of this long process.

Experience with the WISC/WAIS tests and other tests helped me to co-author another IQ test, the nonverbal Leiter International Performance Scale, Leiter-R in 1997 and Leiter-3 in 2013. These nonverbal IQ tests (picture and 'hands on' assessments requiring no speaking by the examinee) have become popular in the USA but also in several European countries as well. Each of the Leiter publications required years of effort in developing items, field testing, standardization, and statistical studies for the written manuals. All of this prepared me even more for assessing the proper use of IQ tests in psychology and education.

In later years (2008 to 2014), I also used both types of intelligence tests (WISC/WAIS and SB5) in four ways: (a) to collect data for the development of published IQ tests, (b) to conduct clinical evaluations for clinical psychologists who were testing patients with cognitive issues (e.g., Assessment Specialist at the Sundstrom Clinic in Portland, Oregon and Associate to Dr. Lane Vander Sluis, Psychologist in Vancouver, Washington), (c) as an Examiner for the Department of Human Services, State of Oregon (testing clients who applied for financial support because of disabilities), (d) by completing an 8-month Postdoctoral Practicum at Southern Methodist University (SMU) where I completed a graduate course that included advanced, supervised training in the clinical use of tests. This included testing of clients in the Department of Psychology's community outreach clinical testing program. The program included testing adults and children, interpreting, and reporting results of WAIS/WISC, SB5, and other test data. Thus, I have been trained in the development and authoring of tests but also the administration and interpretation of test results in clinical settings.

REVIEW OF REPORTS AND RAW DATA

Materials Reviewed

The following documents were received from the Capital Collateral Regional Counsel-South and studied before this report was written:

- Evaluation Report on Mental Retardation by Stephen Greenspan, PhD, 2009
- Response report on testing by defense psychologist Faye E. Sultan PhD,

as well as the Court Transcript of Dr. Sultan's testimony, 2009

- Raw data from Dr. Sultan's testing with WAIS-IV, 2009
- Psychological evaluation by Gregory A. Prichard, PsyD. 2009
- Raw data on Stanford-Binet Fifth Edition by Gregory A. Prichard, PsyD, 2009
- Transcript of Court Testimony of Dr. Prichard, 2009
- Subsequent Second Interview by Dr. Prichard on 10/21/2019
- Neuropsychological testing Report by Dr. Joyce Lynn Carbonell, PhD, 1987
- Psychiatric evaluation report by Dennis F. Koson, MD, 1987
- Dr. Joyce Lynn Carbonell Report, 1987
- Dr. Dorita Marina Report, 1988
- Dr. Arthur Stillman Report, 2009
- Resume/Curriculum Vitae of several of the psychologists listed here
- Newark (Ohio) City School District Records of Mr. Thompson
- Summaries of Mr. Thompson's childhood and adolescent background included in reports by Drs. Greenspan, Sultan, Koson, Carbonell, Marina, and others.
- Report by Dr. George Barnard, 1982
- Dr. Albert C. Jaslow, Psychiatric/Competency Report, 1976
- Dr. A. M. Castielo, Psychiatric/Competency Report, 1976
- Dr. Charles Mutter, Psychiatric/Competency Report, 1976
- Dr. William Corwin, Psychiatric/Competency Report, 1976

Dr. Prichard Testing in 2009

Because of the importance of this testing of Mr. Thompson, a critique of this administration of the SB5 will be discussed first. I have several serious concerns about the methods and results of the testing by Dr. Prichard who claimed an IQ of 88 for Mr. Thompson. Nearly all the previous testing results in Mr. Thompson's history, were in the range of 70 to 75, including the WAIS-IV testing by Dr. Sultan who found an IQ of 71. However, different results were obtained in Mr. Thompson's adult and incarcerated years by Drs. Marina, Carbonell, and Prichard. The possible reasons for scores obtained in the 80+ range in adulthood will also be discussed.

Practice Effects. My first concern is that Dr. Prichard violated an important "best practice" in assessment psychology by administering another similar IQ test only two weeks after Dr. Sultan's testing. The WAIS-IV was administered by Dr. Sultan on March 20, 2009, and the SB5 by Dr. Prichard on April 6, 2009. The AAIDD's standards for IQ testing for Intellectual Disability warn that there are "practice effects" (increases in test scores due to repeated testing) from administration of the same or similar IQ tests "within the same year" for the same individual (2010, p. 38). This concern for practice effects is also mentioned in the Standard 1.9

of the AERA/APA/NCME's "Standards for Educational and Psychological Testing" manual (1999, p. 19)[v].

The Technical Manual for the SB5 (Roid, 2013b, p. 74) recommends an interval of 6 months to one year between repetitions of the test due to practice effects. In a study of 81 individuals, ages 21 to 59, repeated testing of SB5 showed an average increase of 3.43 points for the Full-Scale IQ (Roid, 2003b, p 72). The WAIS-IV (Wechsler, 2008, p. 51) showed a shift of 4.3 points (4.9 for ages 55-69) in Full Scale IQ upon retesting in a sample of 298 examinees given the test twice within a median of 22 days. Therefore, the testing by Dr. Prichard was likely inflated by practice effect of nearly 5 points.

Because I have worked on the development of Wechsler scales and the Stanford-Binet and have used both the SB5 and WAIS-IV in clinical evaluations, I can attest to the similarities between the tests—an important fact that is relevant to the practice effect in the testing results of Dr. Prichard. Following is a list of the most prominent similarities between the two IQ tests:

1) **Verbal Knowledge on SB5 and Vocabulary on WAIS-IV.** Both "subtests" begin by testing individuals with pictures and proceeds to asking, "what does this word mean" for printed lists of words (from easy to difficult), thus measuring the constructs of "word reading ability" and verbal comprehension.
2) **Nonverbal Visual-Spatial on SB5 and Block Design on WAIS-IV.** Using plastic chips in SB5 compared to plastic blocks in WAIS-IV, the examinee must copy a pattern of chips/blocks that complete a design shown on the Stimulus Books used in the test administrations.
3) **Nonverbal Fluid Reasoning on SB5 and Matrix Reasoning on WAIS-IV**. Using very similar printed designs (often showing 4 by 4 sections of geometric stimuli or animal drawings) that form a pattern, shown with one section blank. The examinee is to use logical reasoning and select the best stimulus to complete the missing section.

Therefore, we can conclude that these sets of 3 subtests are strongly similar and are central to the calculation of Full-Scale IQ in both tests. Other WAIS-IV subtests such as Arithmetic, Information, and Similarities have some features of SB5. **So, the probable increase in the IQ score of Mr. Thompson upon the second testing with Mr. Pritchard would be somewhere in the range of 5 points due to practice effect.**

Practice Effects on Carbonell and Marina Testing

I have similar concerns about possible practice effects between the testing by Dr. Carbonell in June of 1987 and Dr. Marina in November of 1988. Although the interval is approximately 16 months between testing, the same test of the same edition (WAIS-R) was used by both examiners. It is possible that some degree of "test learning" was gained by Mr.

Thompson. The proper practice would have been to use an alternative IQ measure such as the Stanford-Binet Fourth Edition published in 1986.

Dr. Prichard Testing of SB5 Continued

Concerns over Incorrect "Start Points." The official directions for beginning testing on SB5 subtests ("Start Points") are on Page 60 of the SB5 Examiner's Manual (Roid, 2003a). It says quite clearly to, "Find the appropriate start point by estimating the examinee's present **functional ability level** and determining his or her chronological age." Also, the Item Book 1 for the first two subtests of SB5, have the phrase "Estimated Ability Age" listed at teach start point. There was a long history of low functioning by Mr. Thompson in his school years and Drs. Carbonell, Marina, and Koson had described the evidence of brain disfunction and memory problems in their clinical examinations in 1987-88. Knowing that there was a possibility of disfunction and low performance with Mr. Thompson, Dr. Prichard should have started the first subtest and others one level below where he chose to start. For example, he started the Nonverbal tests at Level 3 when he should have started at Level 2. This would be done to confirm that he did or did not fail easier items that were not administered by Dr. Prichard. For example, it is possible that Mr. Thompson would have failed items in the lower level questions on subtests such as Verbal Fluid Reasoning (where he had one incorrect answer at the start point) and Nonverbal Knowledge (where he only scored 2 correct points after the start point practice items), and other subtests. Dr. Pritchard should had used "clinical judgment" (defined as a special type of judgment rooted in a high level of clinical experience and testing with persons having Mr. Thompson's background and history as promoted in the AAIDD standards, 2010, pp.28-29). Dr. Prichard claimed to have studied the background and history of Mr. Thompson. However, he shows no acceptance of the facts that Mr. Thompson was held back in more than one year of school and often showed behaviors (and lack of abilities) which match those of young adolescents (under 16), suggesting that start points be moved back to assure accuracy of scoring**. It is possible that errors in the range of 1 point in each of 10 subtests could have been found during testing. These additional incorrect answers are possible, and this would have lowered the final IQ score. Therefore, this serious error in test administration suggests that the exact results are in question and the test administration was "spoiled." Based on my professional knowledge of the SB5 test, I rescored the test by subtracting one raw-score point for each of the 10 subtests. As I expected, a decrease in Full-Scale IQ was found to be 5 points to a total of 83 instead of 88.**

Detailed Examination of the SB5 Subtests Given by Dr. Prichard

Object Series/Matrices. In the first subtest administered by Dr. Prichard, the Fluid Reasoning, Object Series/Matrices, Mr. Thompson begins at Item 18 but fails Item 20 (and 23 through 26), and only gets a total of 4 items correct (2 were practice items at the beginning of the level)**. This is a definite sign to an experienced clinician that the start point was too high for**

Mr. Thompson. By starting at Item 18 instead of 14 (based on chronological age, not functional age), Dr. Prichard has assumed that Mr. Thompson would have correctly answered all 17 items that were slightly easier than Item 18, as part of the standard "base points" given at Level 3. For example, it is possible that Items 16 and 17 could have been incorrectly answered by Mr. Thompson because they required the completion of two missing pieces in a series of six colored geometric shapes—the most difficult items in the Level 2 set of items 14 to 17.

Vocabulary. Dr. Prichard begins testing at Level 3 based on chronological age which automatically gives Mr. Thompson credit for 26 Base Points--prior scoring points for items at lower levels. Mr. Thompson receives only a score of 1 for a partial answer instead of a full 2 points for a complete answer to the second practice item (item number 22). Then, at the start of the unprompted items (Item 23), Mr. Thompson again answers partially, getting a score of 1 instead of a full 2-point score for a complete answer. So, again, the poor score points early in the subtest administration show clear evidence that Mr. Thompson should have started at Level 2 instead of Level 3. Thus, the probability of more incorrect items in the earlier Level 2, leading to a lower final IQ score. Just two additional items incorrect would have reduced Mr. Thompson's Vocabulary standard score to 7 (a full standard deviation below average) instead of 8 as marked by Dr. Prichard. Also, a keen clinical eye would have spotted that Mr. Thompson's answers to vocabulary questions were extremely brief (1 to 5 words with many answers 4 or less). For example, when asked "What does 'jitters' mean?" he answers "nervous." Although this is technically correct according to scoring directions, clinical experience would say that this is a very basic answer that is a bit incomplete. Yet, Dr. Prichard scores this answer 2 points instead of 1 point, again dropping the overall score lower and affecting the size of the Full IQ.

Concerns on Other Subtests Assessed by Dr. Prichard

The first two subtests discussed above are key to the starting points for the remaining subtests because they are considered "routing subtests" that dictate the starting levels for the remainder of the test. Therefore, we can only estimate that Mr. Thompson may have incorrectly answered even more items at lower levels than Dr. Prichard tested.

Other Nonverbal Subtests. For example, on Visual-Spatial Processing, Mr. Thompson assembled the pieces of the final design at Level 4 at the maximum time limit (180 seconds) and, then, scores zero on Level 5. This pattern seems odd and suggests that only 1 point should have been given to the lengthy Level 4 answer, reducing the "VS" score. Also, on the Working Memory subtest, Mr. Thompson shows signs of not comprehending the Task of remembering and separating the numbers given into the correct order (receiving only 5 points out of 6 at the starting point of Level 3. This suggests that Level 2 would have been a better start point. Also, working memory (defined as the ability to hold information in the mind while you rearrange, sort, or process in other ways the order of the information being held in memory). This suggests brain-function concerns as expressed in the reports by Dr. Carbonell and Dr. Koson in 1987.

Working memory is known to be a key memory ability for success in school or work that requires memory skills.[vi]

Verbal Subtests. Mr. Thompson received only 1 point (instead of the full score of 2) on the first question at the start point of Level 4 of the Verbal Fluid Reasoning subtest. This is a possible sign that Level 3 would have been best as a start point. Level 3 is then used for Verbal Quantitative Reasoning by Dr. Prichard because Mr. Thompson scored a very low 2 at Level 4, the typical starting point based on his routing-test performance. Dr. Prichard correctly moved back one Level in this situation. This suggests Level 3 as a starting point for all the Verbal subtests. For example, Level 3 on the Verbal Fluid Reasoning has a very diagnostic task of sorting chips (with pictures printed on them) according to concepts. Concept identification and recognition are key elements of higher-level thinking—a concern historically in Mr. Thompson's past testing results.

The Flynn Effect on the Test Norms across Time

The extensive research by Dr. J. R. Flynn (1987, 2012)[vii] has shown that IQ test results must be evaluated based on the time that they were first standardized. Dr. Stephen Greenspan also noted the importance of this "Flynn Effect" in evaluating the Prichard results (Greenspan, 2009, p. 10). Standardization involves collecting test results on a nationally representative sample of people to establish the norms of the test (where the new examinee is compared to the average across the nation). After studying test data from 14 nations he established that IQ scores are affected by an increase in score level equal to 0.3 IQ points per year following their standardization date. Because the SB-5 was standardized in 2001-2002 (published in 2003), the Prichard testing in 2009 was done 7 years after the initial standardization. Thus, the "Flynn Effect" for the 2009 testing is an inflation of the IQ score between 2.4 and 2.1 points. Thus, we need to subtract another 2+ points from the reduced, estimated true IQ of 75, as shown below:

Summary of Corrections in IQ due to Errors in Test Administration

1. **Practice Effect: 5 points lower**
2. **Starting Points Incorrect: 5 points lower**
3. **Flynn Effect: 2 points lower**
   TOTAL CORRECTION: 12 points lower—Full-Scale IQ of 76.
   According to AAIDD standards, the error band of 3 to 5 points around this total Score would in the interval of 71 to 81 (with 71 being the same as found by Dr. Sultan).

Behavioral Observations. Dr. Prichard did not complete the section on the testing behaviors of Mr. Thompson. Thus, we are made unaware of any unexpected actions or reactions of Mr. Thompson to the administration of the test. For example, the examiner should indicate if

the examinee understood the instructions, had adequate vision and heath, was cooperative, and that the testing session was considered a valid representation of the examinee's current functioning. Dr. Prichard also discussed very little about the testing session in his final report, instead reviewing much of the background information and describing the test scores rather than stating the reasons for considering the testing session to be valid. It is professional and best practice to complete the behavioral section of the record form with confirmation of a valid testing session. In contrast, Dr. Sultan completed the test-session behavior of Mr. Thompson in a very thorough way after administering the WAIS-IV in 2009. Any test administration can be strongly affected by the cooperation, mood, health, vision, and other factors in the examinee's life at the time of testing.

Second Interview and Assessment by Dr. Prichard in 2019

Dr. Prichard completed an "Intellectual Disability Assessment" on 7/25/2019. The title of his report suggests that some type of re-testing was included, but the report includes primarily interview and description of historical records on Mr. Thompson. The degree to which this is a true "assessment" of Mr. Thompson is questionable for the following reasons:

1) **Emphasis on Adult Status.** The most important emphasis of an assessment of Mr. Thompson should be on his mental and behavioral functioning at the time of his crime (age 24) and early onset of cognitive disability in childhood. Instead, the report shows no formal testing to provide hard data instead of impressions from an interview. He discusses little of the childhood history of Mr. Thompson with significant gaps that exclude the abuse of his parents, the multiple times he was held back in grade levels. Also, he omits the many other details of his dysfunctional behaviors between ages 18 and 24 when the crime occurred (e.g., reliance on others to support him, alcohol and drug addiction, prostitution with homosexuality).
2) **Emphasis on the IQ scores and Minimizing the Role of Dysfunctional Adaptive Behavior.** Much of Dr. Prichard's 2019 report highlights the IQ scores by Drs. Marina, and Carbonell but dismisses the several test scores in the 70 range (i.e., the professional standard of including an error band of 5 points on either side of the obtained IQ score, allowing scores of 71, 74, and 75 to be seriously considered, AAIDD, 2010; DSM-5, 2013).
3) **Lack of Detail on Discussions of the Results of Assessments by Drs. Marina and Carbonell.** Prichard's report eliminates any reference to the neuropsychological results reported by Marina and Carbonell that moved them to describe Mr. Thompson as having "organic brain damage," and other cognitive dysfunctions. Instead, he reports the IQ numbers only and minimizes the extensive discussions of his childhood dysfunction in these reports.
4) **General Dismissal of the "Three Prong" Definition of Intellectual Disability (AAIDD, 2010;** Dr. Greenspan Report, 2009). Prichard minimizes the importance of

assessing adaptive behavior as shown in the Report by Dr. Quaou, 2017. This important part of the identification of intellectual disability is a vital part of any thorough Intellectual Disability evaluation.

5) **Disregard for the Gullibility History of Mr. Thompson.** Prichard correctly employs a process of obtaining Mr. Thompson's permission to be interviewed, knowing that the State would be given a report on his responses. However, Prichard seems to be unaware of the long history of Mr. Thompson's "need to please" others and be gullible about the long-term effects of his behavior and responses during Court-related events. Thus, Mr. Thomson acts quite cheerful and "adult" when in fact his history shows a different picture of his inability to control his own behavior and future. Examples include his inabilities as a "husband" according to his "wife," and decision to enroll in the marines at the suggestion of a recruiter when his abilities and background did not fit the military standards, resulting in discharge.

Contrasting Results by Dr. Sultan's Administration of the WAIS-IV

Review. I have reviewed the report and the raw data presented by Dr. Sultan from her 2009 administration of the Wechsler Adult Intelligence Scale—Fourth Edition to Mr. Thompson wherein she found an IQ of 71. Based on my work experience as a Senior Project Director and Senior Consultant for Wechsler tests with Harcourt Assessment (1987 to 1992), my published research on Wechsler tests,[viii] and my own clinical use of the WAIS-IV, I can testify that Dr. Sultan's raw data shows an accurate administration and scoring of the test.

Accuracy. I checked the accuracy of her scoring (showed on Page 1 of the Thompson Record Form for the WAIS-IV completed by Dr. Sultan on March 20, 2009), using the official Administration and Scoring Manual (Wechsler, 2008).[ix] Also, I examined each of the 10 subtests administered to see if proper starting points, administration, and scoring methods were used. All subtest raw scores were correctly copied to Page 1 of the Form—showing no possible scoring error on the test Record Form. I also noted that Dr. Sultan completed the Behavioral Observations section of the Record Form, verifying that the testing session was valid. She notes some notable characteristics of Mr. Thompson—his restricted vocabulary, peculiar speech pattern, inappropriate smiling, and poor motor speed. However, she also verifies that the testing session was valid by indicating that Mr. Thompson paid attention, was motivated, and persevered throughout the test. Overall, Dr. Sultan's Record Form is more clearly notated (easy to read notes on poor answers, clear writing of the word-by-word responses of the examinee). The overall quality of the Record Form entries is superior to those shown by Dr. Prichard who showed several, unclear hand-written notations in his SB5 Record Form.

Concerns over the "Scatter" of Scores. Dr. Prichard notes concern with the extremely low Processing Speed score obtained in Dr. Sultan's testing. His argument is that the low processing speed artificially "pulls down" the full-scale IQ. Processing Speed tasks in the WAIS-IV involve

thinking as well as speed. Large differences between scores on the WAIS-IV or any of the IQ tests is an important part of diagnosis and is not rare in the population (as shown in the extensive tables in the WAIS-IV Administration Manual). In the Symbol Search subtest, for example, quick decision-making is tested as well as speed. Describing Mr. Thompson as being extremely slow in decision-making is an important finding and relates to his many poor decisions leading to his crime as well as his private life before the crime.

Review of Historical Testing with Wechsler and Stanford-Binet Tests

Several of the background reports on Mr. Thompson mention the test scores he received at younger ages. As part of his elementary school assessment of his intelligence, Mr. Thompson was designated as "Educably Mentally Retarded" and given the WISC (1949, first edition). He received an IQ score of 75 on the WISC. However, the WISC testing employed norms that were already 11 years old based on the Flynn Effect. Thus, the score of 75 should be lowered 3 points to 72, clearly within the error-of-measurement confidence interval for a finding of IQ 70. Similarly, the Stanford-Binet L and M forms (1937 publication) were given to Mr. Thompson in 1958 and 1961 with scores in the low 70's. With the Flynn Effect correction for the approximately 20 years between the original norming date and Mr. Thompson's testing, an additional 6 points should be deducted from the 75 and 74 IQ scores he received on the Stanford Binet. Thus, Mr. Thompson showed very low IQ scores of approximately 69 and 68 in his elementary school years. This finding is very important in two ways—scores below 70 and, also, evidence of mental retardation at a young age (an important criterion for complete data to establish Intellectual Disability, as reported in the AAIDD standards). Also, these corrected results stand in contradiction to Dr. Prichard's position (Testimony 2009) that the standard deviation of 16 in the early Stanford-Binet editions shows no mental retardation. The probable score of 68 in Mr. Thompson's his early testing shows that Dr. Prichard's argument is incorrect.

Testing by Drs. Carbonell and Marina, 1987 and 1988

There were also administrations of the WAIS-R to Mr. Thompson in 1987 (by Dr. Carbonell) and by Dr. Marina. As discussed previously in this report, the administration of the same IQ test (WAIS-R), even with a sixteen-month delay between testing, is not "best practice." The technical studies in the test manuals for the WAIS-R show that significant improvements in scores occur when the test is given to the same person on two occasions (2 to 7 weeks apart). For a longer period, there would still be some degree of "practice effect" occurring that brings the Marina testing suspect. Because there was no record form (the raw data showing all questions and responses), it is difficult to comment on their accuracy and validity of either of these WAIS-R administrations. It is noted that Dr. Greenspan made Flynn Effect corrections to the IQ scores obtained by Carbonell and Marina, showing scores of 81 and 79. These scores appear to be unusually higher than earlier or later administrations of WISC/WAIS tests, for some unknown reason. Possibilities include the effect of further learning by Mr. Thompson during the 12 years in prison after the crime (e.g., his studying for a GED). Also, research shows that adults

continue to increase their vocabulary into the elderly years. At nearly the same time, in 1984, Dr. Stillman had examined Mr. Thompson and stated that he was "functionally retarded" and would be unable to testify and assist his attorneys.

CONCLUSIONS AND RECOMMENDATIONS

Estimated Impact of Erroneous Administrations, Practice Effects, and other Factors

Corrections to the Thompson IQ Scores. Especially important are the recent intelligence test results for Mr. Thompson. As discussed previously, Dr. Prichard made the unprofessional choice of giving a similar IQ test, the Stanford-Binet Fifth Edition, too soon after Dr. Sultan's testing with the WAIS-IV on Mr. Thompson in 2009. The gap in time between the two testing sessions was only 16 days (March 20th followed by April 6th)—far too soon for a re-testing with similar tests. This resulted in **a practice effect that could have inflated the IQ by 5 points.** If a correction for this error is made, the IQ could be 83 (instead of 88). Also, to make a correction for the inappropriate starting Levels, as discussed above, an even lower IQ estimate of 5 less (now 78) can be made. This was found by simply reducing each of the 10 subtest raw scores by 1 point each (as discussed in the sections on subtests previously detailed), and using the official online scoring system for SB5 (by Pro-Ed Inc., publisher of SB5), the IQ would be reduced by another 5 points resulting in an estimated IQ of 78. Then, an additional 2 IQ points must be subtracted to account for the Flynn Effect of changes in the normative sample across years (Full-Scale IQ now 76). Finally, the result based on an error-of-measurement confidence interval of 71 to 81 (according to AAIDD standards) would give Mr. Thompson an IQ as low as 71.

Thus, Mr. Thompson's corrected score could be as low as 76, with error band extending to 71 and be comparable to the 71 obtained by Dr. Sultan. Because of the serious errors committed by Dr. Prichard, the use of his SB5 report seems totally inappropriate for any future court examination of Mr. Thompson. In my expert opinion, Dr. Prichard's report should be removed from Mr. Thompson's historical record because of serious flaws. Also, the IQ scores obtained by Drs. Carbonell and Marina in 1987-88 should be of lesser importance given the possibility of adult learning by Mr. Thompson. Also, these two psychologists strongly report the neuropsychological dysfunctions in Mr. Thompson, including brain damage from the severe abuse of alcohol and drugs during the six years from age 18 to 24 when the crime was committed.

Differences between test scores on Dr. Sultan's testing of Mr. Thompson is not the only data that showed "scatter" among scores, e.g., Dr. Marina's results show wide differences among the subtests of WAIS-R. Differences between scores occur even in cases of very low IQ (Reference: https://www.mentalhelp.net/intellectual-disabilities/psychological-tests/, or see the Administration Manual for the WISC-IV).

As a verification of my opinion on the flawed nature of Dr. Prichard's testing results, the records show the same opinion by Dr. Stephen Greenspan, Ph.D. (2009, pp 8-9), a highly regarded expert on intellectual disabilities. He said that the Prichard results should be "thrown out and disregarded" and, at least lowered. Dr. Greenspan also provided extensive data confirming the impaired intellectual and behavioral function of Mr. Thompson. Thus, I believe that Thompson's history of dysfunction cognitively and behaviorally show that he can be described as "mentally retarded" (now called "intellectual disability"). As advocated in the definitive 2010 standards presented by the American Association on Intellectual and Developmental Disabilities (AAIDD, 2010**), the accurate score obtained by Dr. Sultan (IQ of 71) is within the error-of-measurement confidence interval surrounding an IQ score of 70 indicating the mental retardation (intellectual disability) of Mr. Thompson. Also, to be noted, the previously discussed test results in Mr. Thompson's elementary school years (ranging from 68 to 72) confirm a final IQ of 70, given the error-of-measurement confidence interval surrounding 70.**

Signed and Completed on January 17, 2020

Gale H. Roid, Ph.D.

Dr. Gale H. Roid, Ph.D., ABAP

Test Author and Consultant, Salem, Oregon, USA
Former Full Professor and Director of the Doctoral Program
School of Education, Southern Methodist University (retired)
Fellow, American Psychological Association, Division 5
Inaugural Fellow, American Educational Research Association
Inaugural Fellow, American Board of Assessment Psychology

[i] Roid, G.H. (2003a). *Stanford-Binet Intelligence Scales, Fifth Edition,* Examiner's Manual. Austin, TX: Pro-Ed Publishing. Roid, G.H. (2003b)—SB5 Technical Manual.

[ii] American Association on Intellectual and Developmental Disabilities, (2010. *Intellectual Disability: Definition, classification, and systems of supports.* Washington, DC: AAIDD.

[iii] Other published tests I have authored (or co-authored) include the *Leiter International Performance Scale (Second—Leiter-R, and Third Editions—Leiter-3*), a nonverbal IQ test and the Merrill-*Palmer Scales of Development—Revised (MP-R)* a developmental test for children from one month to 6 years of age used to identify developmental disabilities.

[iv] The SB5, Leiter-R, and MP-R are used by psychologists and educators in Australia, Norway, Sweden, Spain, and other countries, often with a test manual translated into the local language. Also, I have been invited to speak at several international conferences.

[v] AERA/APA/NCME (American Educational Research Association, American Psychological Association, and National Council on Measurement in Education) (1999). *Standards for Educational and Psychological Testing*. Washington, DC: AERA.

[vi] Working memory was best described by A. Baddeley in 1986 in his book, *Working Memory*, Oxford University Press. And, researchers such as D. K. Reid, et al, 1996, *Cognitive approaches to learning disabilities*. Austin, TX, Pro-Ed Inc.

[vii] Flynn, J.R. (1987). Massive IQ gains in 14 nations: What IQ tests really measure*, Psychological Bulletin, 101*:171-191. And, Flynn, J.R. (2012). *Are we getting smarter? Rising IQ in the twenty-first century.* Cambridge, UK: Cambridge University Press.

[viii] Roid, G.H., & Worrall, W. (1997). Replication of the WISC-III four-factor model in the Canadian normative sample. *Psychological Assessment, 9* (4), 512-515 and Roid, G.H., Prifitera, A., & Weiss, L.G. (1993). Replication of the WISC-III factor structure in an independent sample. *Journal of Psychoeducational Assessment, 11*, 6-21.

[ix] Wechsler, D. (2008). *Administration and Scoring Manual for the WAIS-IV*. San Antonio, TX: NCS Pearson Inc.

APPENDIX H

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC20-1847

WILLIAM LEE THOMPSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
MIAMI-DADE COUNTY, FLORIDA

LOWER CASE NO: 76-3350B

SECOND AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The lower court disregarded this court's duly-issued mandate in violation of this Court's opinion in State v. Okafor, 306 So. 3d 930 (Fla. 2020).[1] In 2016, this Court, in Thompson v. State, 208 So. 3d 49 (Fla. 2016), ordered the lower court to conduct an evidentiary hearing on Thompson's intellectual disability claim in light of Hall v. Florida, 574 U.S. 701 (2014). The mandate issued February 6, 2017. More than three years later, on June 19, 2020, the State filed a motion asking the lower court to reinstate the invalidated 2009 Order denying Thompson's intellectual disability motion premised on this court's opinion in Phillips v State, 299 So. 3d 1013 (Fla. 2020). The lower court heard argument and conducted a hearing on September 17, 2020. Mr. Thompson argued below, among other arguments, that the lower court lacked the authority to disregard a three-year-old duly-issued mandate by this Court. Thompson also suggested that the court should wait until this Court issued its opinion in Okafor, which was pending at the time. The lower court, however, issued its ruling fifteen days later on October 2, 2020, granting the State's Motion to reinstate the 2009 Order and denying Thompson an evidentiary hearing as required by this Court's

[1] Okafor was pending at the time of the lower court's ruling. This Court issued its Opinion after the Court had denied Thompson's motion for rehearing.

mandate. This appeal follows.[2]

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record:

"R1" - record on direct appeal to this Court from Thompson's 1976 sentencing; "R2" - record on direct appeal to this Court from his 1978 sentencing; "1984 EH 106" – record from federal evidentiary hearing in 1984; "R3"- record on direct appeal to this Court from his 1989 resentencing; "1996 PCR" - postconviction record concerning SC60-87481 on appeal of Thompson's initial 3.850 motion denial; "2005 PCR" - postconviction record concerning SC05-279 on appeal of Thompson's successive 3.850 motion denial, addressing Atkins v. Virginia; "2007 PCR" - postconviction record concerning SC07-2000 on 3.850 appeal following the lower court's refusal to hold an evidentiary hearing in conformity with this Court's Order in SC05-

[2] Thompson timely filed his initial brief on April 26, 2021; however, he was instructed to refile an amended brief to conform with the structure required by Rule Fla. R. App. P. 9.210(b). Thompson filed an amended brief on April 27, 2021 in which he moved the preliminary statement, citations to the record and request for oral argument to appear after the table of authorities. On April 29, 2021, he was again instructed to refile because, using the new font requirement of this Court, which is significantly larger than the fonts previously accepted, his brief exceeded 75 pages. Thompson now files this amended initial brief having changed the font, this footnote, and the certificate of compliance; his brief has not been altered in substance.

279; “2009 PCR” - postconviction record concerning SC-09-1085 on appeal of Thompson’s 3.851 denial; following the lower court’s truncated hearing of Thompson’s Atkins claim; “2009 T1” and “2009 T2” – day one and two of transcripts from the evidentiary hearing held following this Court’s remand in SC07-2000, on April 13 and 27 of 2009; “2015 PCR” and “2009 PCR Supp” – postconviction record concerning SC15-1752, in which this Court reversed the lower court’s denial of Thompson’s 3.851 motion and remanded for an evidentiary hearing in light of Hall v. Florida; “2018 PCR” – postconviction record concerning SC18-1435 on 3.851 appeal in light of Hurst v. Florida and Hurst v. State; “2020 PCR” and “2020 PCR Supp” – postconviction record and supplemental record for the present record on appeal.

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Thompson requests, pursuant to Fla. R. App. Pro. 9.320, that oral argument be heard in this case. Thompson is under sentence of death and oral argument is necessary to fully develop the claims at issue in this case. He is entitled to “a fair opportunity to show that the Constitution prohibits [his] execution.” Hall v. Florida, 574 U.S. 701(2014).

STATEMENT OF FACTS AND CASE

Mr. Thompson’s mental abilities have been at issue from the

beginning of his case. Thompson v. State, 208 So. 3d. 49, 51 (Fla. 2016). On June 24, 1976, after Thompson and co-defendant, Rocco Surace, pled guilty to charges of first-degree murder, kidnapping and involuntary sexual battery for the tragic murder of Sally Ivester in a Miami hotel room, each were sentenced to death (R1 887-89).[3] On direct appeal, this Court allowed Thompson to withdraw his plea because he was prejudiced by an "honest misunderstanding which contaminated the voluntariness of the pleas." Thompson v. State, 351 So. 2d 701 (Fla. 1977).

On remand in 1978, new "counsel filed a motion for a psychiatric evaluation on the grounds that he had 'reason to believe that the defendant may be suffering a mental deficiency or disease which would render him incapable of assisting in his defense, and may have precluded the defendant from knowing right from wrong at the time of the alleged criminal acts set forth in the indictment.'" Thompson v. State, 389 So. 2d 197, 199 (Fla. 1980). Trial counsel told the court that Thompson was "desperately in need of a psychological and neurological exam[']" (R2 20-21), that he knew there was "something desperately wrong," (R2 20-21) and twice stated Thompson was

[3] Rocco Surace also withdrew his plea, Surace v. State, 351 So. 2d 702 (Fla. 1977), and was subsequently tried and convicted of second-degree murder after Thompson bizarrely testified on Surace's behalf claiming responsibility for Miss Ivester's murder. Surace v. State, 378 So. 2d 895 (Fla. 3d DCA 1980).

"a *mental retard*." (R2 576-78; R2 583). The trial court denied the motion.

Thompson again pled guilty (R2 39-57). His penalty phase jury recommended death by a vote of 7-5, (R2 198a, 562-64), and the court again sentenced Thompson to death (R2 199a, 567-73).[4] On direct appeal, Thompson challenged the lower court's failure to order psychological testing despite trial counsel's repeated requests. This Court affirmed. Thompson v. State, 389 So. 2d 197, 199 (Fla. 1980).

Thompson continued to challenge his sentence of death in state and federal court, continuing to raise claims relevant to this appeal. In 1982, Thompson sought federal habeas corpus relief. In 1984, the U.S. District Court held an evidentiary hearing. Thompson's trial counsel, Louis M. Jepeway, testified he was concerned about Thompson's ability to comprehend, stating that he never felt like he was communicating with Thompson (1984 EH 109). "I simply could not get him to respond or understand anything that I was trying to say, no matter how basic I was trying

[4] Surace, who had also been granted a new trial, pled not guilty, was tried and convicted of second-degree murder, and received a life sentence. Surace v. State, 378 So. 2d 895 (3rd DCA 1980). In his initial post-conviction motion filed in 1980, Thompson said Surace had forced him to take full responsibility for the crime, when Surace was in-fact the leader. The Court has recognized intellectually disabled defendants face special risks as they are more likely to falsely confess, make "poor witnesses" and are less able to assist and work with their own counsel. Atkins v. Virginia, 536 U.S. 304, 320–21 (2002).

to make it." (1984 EH 109). "It was obvious to me, from the silence on the other end, and the questions that he asked, in a rather repetitive fashion, that he did not understand what was going on." (1984 EH 111). He also confirmed that Thompson "look[ed] to Surace for guidance" and validation every step of the way (1984 EH 110). The court denied relief, and the Eleventh Circuit affirmed. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986).

In 1987, Thompson filed a successive Rule 3.850 motion premised on Hitchcock v. Dugger, 481 U.S. 393 (1987). The post-conviction court denied relief, but this Court reversed. Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987).

In his 1989 resentencing proceeding, Thompson presented evidence of his intellectual disability through lay and expert testimony. Witnesses testified that he was "a slow learner," with "an IQ of seventy-five, had been recommended for special education placement," was "mentally slow" and "retarded." Thompson v. State, 619 So. 2d 261, 263-64 (Fla. 1993). The jury recommended death by a bare majority vote of 7 to 5 (R3 3192-94). The trial court again imposed death. This Court affirmed. Id.

Thompson timely filed his initial postconviction motion pursuant to Florida Rule of Criminal Procedure 3.851, where he raised issues concerning his mental health and ability to comprehend. The lower court denied relief

and this Court affirmed. Thompson v. State, 759 So. 2d 650 (Fla. 2000).[5]

On November 15, 2001, after the enactment of Florida Statute section 921.137 (Imposition of the Death Sentence Upon an Intellectually Disabled Defendant Prohibited), Thompson timely filed a successive motion for postconviction relief alleging intellectual disability as a bar to execution. Following the Court's decision in Atkins, on June 18, 2003, Thompson amended. Without notice to counsel or the presence of Thompson, the circuit court, Judge Hogan-Scola presiding, instructed the State to draft and file a motion to dismiss and strike the amended pleading, which the court granted.[6]

On appeal, this Court reversed and remanded and instructed Thompson to refile within 30 days his Rule 3.851 motion pursuant to Atkins and Florida Rule of Criminal Procedure 3.203 (2004) (Defendant's Intellectual Disability as a Bar to Imposition of the Death Penalty). Thompson v. State, 880 So. 2d 1213 (Fla. 2004).

On August 9, 2004, Thompson timely refiled. The lower court again denied Thompson's motion, this time finding that he was procedurally barred

[5] On November 21, 2001, the Supreme Court granted certiorari review in Atkins.

[6] Indeed, the State so opposed and continually challenged Thompson's right to even have a hearing, this Court remanded his case to the post-conviction court *three times over the course of three years* as set out in this appeal.

from raising his intellectual disability as bar to execution because he had previously presented the evidence as mitigation in his 1989 penalty phase. This Court again reversed and remanded instructing the lower court to hold an evidentiary hearing. Thompson v. State, SC05-279, 962 So. 2d 340 (Fla. 2007) (unpublished table opinion).

On August 8, 2007, Thompson amended his Rule 3.851 motion, adding three additional claims. The lower court struck the three additional claims and again denied Thompson an evidentiary hearing on his Atkins claim. At the State's urging, the court found he was not entitled to a hearing because his IQ scores did not meet the strict cut off in Cherry v. State, 959 So. 2d 702 (Fla. 2007). On appeal, this Court once again instructed the lower court to hold an evidentiary hearing, stating, "In making a determination of whether Thompson meets the requirements of mental retardation, the trial court shall consider the requirements set forth in Cherry." Thompson v. State, 3 So. 3d 1237, 1238 (Fla. 2009) (citations omitted).

In 2009, the circuit court conducted an evidentiary hearing, which was rife with rulings limiting Thompson's presentation of evidence. The Defense presented Faye Sultan, Ph.D., and Bill Weaver, Thompson's special-ed teacher, and attempted to present Stephen Greenspan, Ph.D. Sultan opined Thompson met the diagnostic criteria for intellectual disability. Sultan

reviewed records, interviewed witnesses, and administered the WAIS-IV on which Thompson obtained a full-scale IQ score of 71. She opined that at age fifty-seven, Thompson functioned at the same intellectual level as he was at age ten (2009 T1 107). As he got older, "the discrepancy between his chronological age and his mental age grew." (2009 T1 108). She further noted, Thompson had the mental skills of roughly a twelve-year-old, which are reading and writing grammatically correct sentences and paragraphs on a sixth to seventh grade level (2009 T1 108).

The State presented Gregory Prichard, Psy.D. Prichard administered the Stanford-Binet, Fifth Edition (SB-5). He gave the test sixteen days after Sultan administered the WAIS-IV, which, as is widely recognized, is improper and can inflate a score due to the practice-effect. Prichard gave Thompson a full-scale IQ score of 88, an outlier among Thompson's scores. He did not administer any adaptive deficit testing, or conduct an in-depth interview to ascertain context about his background. Prichard testified that he didn't conduct any adaptive deficits analysis because he believed Thompson failed under Cherry. Thompson, 208 So. 3d at 56.

Prichard based his opinion on "'common-sense,' his interactions with Thompson, and a review of Thompson's records" to opine that Thompson was not intellectually disabled because of his "ability to enlist in the Marines,

obtain his GED, and work as a security guard, cook, roofer and truck driver."[7] Thompson, 208 So. 3d at 56.

In his 2009 report, Prichard failed to note the significant deficits Thompson demonstrated in school. At school, Thompson performed well below expected grade levels and was seen as clumsy and slow. Id. at 55; (2020 PCR 1600). The school told Mrs. Thompson, as early as preschool, that her son was mildly intellectually disabled (2009 T1 38). At age five, Thompson took the Stanford-Binet IQ test, and achieved a full-scale IQ score of 75. Thompson, 208 So. 3d at 59. Three years later he scored 74 on the same test. Id.

In 1961, school officials identified Thompson as an "educable mentally retarded" (EMR) student. (2009 T1 39, 70). The school placed him in EMR classes where he remained through fourth grade, but after that, the family moved to a school that did not offer a special education program (2009 T1 39, 44). Thompson obtained Ds and Fs in mainstream classes (2009 T1 40). He was held back three times, (in first, fifth, and eighth grade), although the

[7] The inquiry of adaptive functioning must focus on deficits, not strengths. See Moore v Texas, 137 S. Ct. 1039, 1050 (2017) ("the medical community focuses the adaptive-functioning inquiry on adaptive deficits" and criticizing state court for "overemphasiz[ing] Moore's perceived adaptive strengths" such as that Mr. Moore "lived on the streets, mowed lawns, and played pool for money").

school frequently "placed" Thompson in the next grade even though he could not comprehend the curriculum (2009 T1 50). Thompson dropped out of school just before ninth grade; Thompson was 18 at the time, his classmates were only 14 (2009 T1 50).

As noted above, Thompson sought to present Stephen Greenspan, Ph.D., a highly regarded expert on intellectual disability, to explain the meaning and significance of Thompson's IQ scores over his lifetime and a general explanation to the court of the medically accepted consensus on evaluating individuals with intellectual disabilities. The court excluded Greenspan's testimony because he had not evaluated Thompson. Thompson, 208 So. 3d at 59-60. Had Thompson been able to present Greenspan, he would have explained the relationship between IQ scores and adaptive functioning, "including how significant deficits in adaptive functioning can affect a full-scale IQ score." Id. at 59. This testimony, based on crucial scientific principles, would have rebutted Prichard's testimony, and established that the evidence Thompson presented "was more supported by the facts and data than [the findings of] Dr. Prichard." Id. at 57.

Relying on the unconstitutional standard established in Cherry, the court denied Thompson's motion (2015 PCR 833-34). Almost exclusively addressing only the first prong of the three-prong standard, the court found,

"[e]very expert, including Dr. Sultan, testified that Defendant's IQ is above 70. That would put the Defendant in the borderline category, which is not mentally retarded." (2015 PCR 835). As for the remaining two criteria, the court did not conduct any analysis. Noting the strict limitations in Cherry, the court stated that when a defendant "does not meet the first prong . . . *we do not consider the two prongs* . . . ." (2015 PCR 836) (emphasis added).[8]

On appeal, this Court affirmed, holding, "that there is competent, substantial evidence to support the circuit court's factual findings that Thompson is not mentally retarded, *based on this Court's definition of the term as set forth in Cherry*." Thompson v. State, SC09-1085, 41 So. 3d 219 (Fla. 2010) (unpublished table opinion) (emphasis added).

On May 27, 2014, the Supreme Court of the United States held unconstitutional the standard established in Cherry. Hall v Florida, 572 U.S. 701 (2014). In 2015, Thompson timely filed the successive 3.851 motion at issue. Thompson argued that the court's initial assessment of his Atkins claim improperly relied on the unconstitutional rule announced in Cherry (2020 PCR 75) and rejected in Hall, and requested an evidentiary hearing

[8] Following the 2009 hearing, Thompson filed two motions to disqualify Judge Hogan-Scola from presiding over his case due to animosity toward counsel and an inability to be fair and impartial to Thompson (2009 PCR 40, 805).

where he could present evidence that he meets all three prongs of the intellectual disability standard (2020 PCR 76). The State again objected. Relying on the record and order from the 2009 proceedings, and argument at the case management conference, the court, now with Judge Tinkler-Mendez presiding, ruled that "the requirements of Hall were met." (2020 PCR 133). On appeal, this Court reversed and remanded for an evidentiary hearing "to be conducted pursuant to the United States Supreme Court's holding in Hall and this Court's holding in Oats," Thompson, 208 So. 3d at 60. Expressly finding that the requirements of Hall were *not* met in the lower court proceedings, this Court noted,

> Although Thompson has had a broad range of IQ scores over his lifetime, he received several IQ scores below 75, and in 2009 the defense expert tested him with a score of 72 In reviewing the history of this case, it is clear that Thompson did not receive the type of 'conjunctive and interrelated assessment' that Hall requires, as more recently set forth in Oats v. State.

Id. at 50 (citations omitted). This Court issued its mandate on February 6, 2017.

On June 19, 2020, the State filed its Motion to reinstate Judge Hogan-Scola's 2009 Order. The Parties were finally scheduled to depose the State's

expert in June of 2020[9] and begin scheduling depositions for the two

[9] In its Order, the lower court stated, "Since remand, this court has been trying to conduct the evidentiary hearing. In this time, counsel for the Defendant, Mr. Thompson, filed various pleadings and other claims with the Supreme Court of Florida, both related and unrelated to his intellectual disability claims." (2020 ROA 1657). To the extent that the lower court's language suggests Thompson caused or wanted an extensive delay, the record below belies such a finding. Thompson has been ready to present his case and repeatedly urged the court to move the case forward; the delay has primarily been attributable to scheduling issues and other issues with the State's expert, Dr. Prichard.

At a status hearing held October 24, 2017, six months after Thompson listed his defense expert, the State finally confirmed Prichard was "onboard" to conduct the State's evaluation of Thompson, and the parties agreed Prichard's evaluation would be recorded (2020 PCR 1051, 1053). Weeks later, however, at a status held November 9, 2017, the State lodged verbal objections to recording the evaluation, which was scheduled for Monday, December 11, 2017 (2020 PCR 578). Without holding a hearing required by established Florida law, on December 5, 2017, the lower court issued a written order granting the State's objections. Thompson filed an emergency writ and motion to stay the lower court proceedings on December 6, 2017 (FSC Case No. SC17-2127). Following, the lower court scheduled a hearing for two days later on December 8th, during which it vacated all previous orders concerning the issues asserted in Thompson's emergency petition (2020 PCR 549, 567) As a result, Thompson filed a notice to voluntarily dismiss the emergency writ filed with this Court.

On January 29, 2018, the lower court held a hearing on Thompson's right to have counsel present and record the State expert's IQ testing and evaluation (2020 PCR 1075-1367). The lower court granted the State's objections allowing Defense counsel to be present, but in a separate room with their expert, observing on closed-circuit television (2020 PCR 7306-37. Thompson filed an emergency writ with this Court which was denied on November 28, 2018 (Rehearing denied December 28, 2018, FSC Case No. SC18-1395). On January 7, 2019, the Parties began picking dates for the evaluation. At a status held February 20, 2019, the State informed the Parties that Prichard's earliest availability was the week of May 21, 2019 (2020 PCR 1479-80). After nearly two years of litigation on the recording issue, the State expert re-evaluated Thompson on July 25, 2020 but chose not to conduct

Defense experts,[10] when the State filed its "Motion for Reconsideration and Request to Deny Defendant's Seventh Motion for Postconviction Relief Pursuant to Phillips v. State, [299 So. 3d 1013 (Fla. 2020)]." The State argued that because Thompson's case was remanded "solely based on [this Court's] opinion announced in Walls v. State that Hall v. State [sic] was retroactive," in light of Phillips, in which this Court receded from Walls,

any testing (2020 PCR 1851).

At five status hearings held in 2017 (March 9th, April 20th, May 25th, August 21st, and October 24th), Thompson urged the lower court to refrain from ruling on his Rule 3.851 motion raising Hurst v. State and Hurst v. Florida claims until his intellectual disability claim was heard, to prevent any delay (2020 PCR 471, 473, 475, 479, 511-13, 521, 526, 850, 853-54, 1034-35, 1038-40, 1058, 1060). Despite this, the court held argument on December 14, 2017, stating, "[a]nd if the Court temporarily loses jurisdiction, because you wish to take an appeal of the Court's ruling on the Hurst issues, absolutely fine. I don't have any particular problem with that." (2020 PCR 1039).

The lower court entered its Order denying Thompson's motion pursuant to Hurst on July 20, 2018, the same day it granted the State's objections to recording his compulsory mental health evaluation. Thompson appealed both issues simultaneously, the Hurst appeal was not itself the cause of any additional delay. Even if Thompson had not taken either appeal, in October of 2018, Hurricane Michael devastated areas in the panhandle of Florida, where the State expert resides and works, causing him to be unavailable for several months following.

[10] The Defense properly filed their initial experts' reports, as required by Rule 3.851, in June of 2017, and rebuttal expert reports on January 17, 2020, and July 28. 2020 (the Reports are found in the current record on appeal at pages 1597 and 1609). The State did not properly file its expert's report, which due to delay by the State and its expert, was not due until October of 2019. Undersigned counsel contacted the Clerk's office and learned that the State filed a notice of filing the report on October 21, 2019, (ROA PCR Supp 58), but failed to attach the report.

Thompson was no longer entitled to his mandated hearing (2020 PCR 1551) (citations omitted). The State requested that the lower court reinstate the previously invalidated Order authored by Judge Hogan-Scola in 2009, calling it "controlling" and reliable because it had "already been affirmed by [this Court] in 2010." (2020 PCR 1551). The State did not offer any case law or legal grounds to support what it was asking the lower court to do, e.g. disregard an appellate court's duly-issued mandate. The State told the lower court in its Motion:

> The 2016 mandate from the Florida Supreme Court directing a second intellectual disability hearing relied exclusively on law that has now been explicitly overturned, and to conduct such a hearing would be an exercise in futility as it runs contrary to current law and other practical policy considerations such as judicial economy and promoting finality.

(2020 PCR 1553). *The very same day*, Thompson requested, via email, that he be given leave to respond to the motion.

Six days later, at a status hearing held June 25, 2020, the State argued, "[B]ecause the reason that the defendant is entitled to a second evidentiary hearing is based on an opinion finding Hall to be retroactive, the defendant is no longer entitled to receive such a hearing" (2020 PCR 1687).

Thompson again requested leave to file a written answer. (2020 PCR 1690). The lower court granted the request, allowing thirty days for

Thompson to respond (2020 PCR 1690).

On July 28, 2020, Thompson timely filed his Response advancing eight arguments. Thompson primarily argued that, as a threshold matter, the lower court was required to deny the State's motion, because it did not have the authority to simply reinstate Judge Hogan-Scola's 2009 Order and disregard this Court's mandate, issued more than three years prior, commanding the circuit court to hold an evidentiary hearing. (2020 PCR 1557). Thompson alerted the postconviction court to the fact that this Court was considering the precise issue in State v. Okafor, 306 So. 3d 930 (Fla. 2020). (2020 ROA 1557).

Thompson also clarified the important procedural and factual differences between his case and Phillips, which had not been remanded by this Court for an evidentiary hearing. (2020 PCR 1560, 1565, 1568-70). Thompson further explained that Phillips only filed his successive Rule 3.851 motion following this Court's opinion in Walls.

The same day Thompson filed his Response, the lower court held a brief status hearing, during which the State sought leave to file a Reply. The court granted the State's request and set a filing deadline of August 14, 2020. On August 18, 2020, without a motion to accept the pleading as timely, the State filed its Reply. In its Reply, the State chose addressed only the

mandate argument. The State relied on only District Courts of Appeal (DCA) cases concerning non-capital postconviction motions and did not acknowledge Okafor.

Thompson filed, and the lower court accepted, a Motion for Leave to File a SurReply and the accompanying SurReply on August 24, 2020, in which Thompson addressed the State's improper reliance on DCA cases concerning non-capital, non-Rule 3.851 litigation and again reminded the Court of established law concerning the finality of duly-issued mandates (2020 PCR 1627).

The following day, August 25th, the State filed a SurSurReply to Thompson's SurReply. Once again, the State relied only on non-capital, non-Rule 3.851 DCA cases.

The lower court heard argument on September 17, 2020. The Parties focused on the mandate issue (the State called Thompson's other arguments "immaterial,"), but Thompson expressly asked the court to rule on all his arguments. (2020 PCR 1853-54, 1841).

Characterizing this Court's duly-issued mandate as a mere "*ask*" of the lower court, (2020 PCR 1836, 1837) (emphasis added), the State urged the court to disregard the mandate, deny Thompson's Rule 3.851 motion, and reinstate its own, previously vacated, 2015 Order (2020 PCR 1840), which

would in effect, reinstate the 2009 Order the State argued was controlling (2020 PCR 1551).

The lower court expressed some concern that it might be seen as "being defiant and disrespectful of [this Court]," (2020 PCR 1834), but the State argued that was not a concern because "the fundamental tenets and foundation of that mandate eroded." (2020 PCR 1838). The State told the court "if a mandate becomes stale, because of Supreme Court law that abrogates the foundation for the mandate, the Court should not comply with that outdated mandate and it should, in fact, proceed." (2020 PCR 1838). The State noted, "[a]nd, you know, *I just want to be very clear that nobody is asking this Court to disrespect or ignore a mandate.*" (2020 PCR 1839) (emphasis added).

Despite distinct factual and procedural differences, the State asserted, over and over, that Phillips and Thompson are "identical" (2020 PCR 1836-37, 1858) and argued that "there would be an inherent unfairness that Mr. Phillips, he does not get an intellectual disability hearing for a second time, but for some reason, Mr. Thompson would." (2020 PCR 1837). Moments earlier, however, the State had recognized that this Court found that denying Thompson a "Hall hearing" would be "inequitable" (2020 PCR 1836).

In response, Thompson explained that the ruling in Phillips did not

undo this Court's 2016 final judgment, and that the lower court lacked the authority to disregard a three-year-old duly-issued mandate (2020 PCR 1842). Thompson also reminded the court that the "exact issue" was pending in State v. Okafor (2020 PCR 1842). As co-counsel on Okafor's companion case State v. Jackson, 306 So. 3d 936 (Fla. 2020), counsel in the instant matter attended the oral arguments virtually. Counsel shared her observations from the argument, admitting that one never knows what a court will decide, but "[this] Court was very skeptical that they had the ability to overturn their own mandate, because the rule, a strict textual approach to the rule, makes it very clear that a mandate can't be overturned more than 120 days from the issuance of the mandate" (2020 PCR 1845). Counsel asked the lower court, "to wait to see what [the Florida Supreme Court rules in] Okafor," because "[the opinion] would offer [the lower court] guidance[.]"(2020 PCR 1846).

The State asserted that Okafor did not apply, (2020 PCR 1841), and argued, "we are not at all in a situation anything like a Hurst error where a defendant may be wrongfully executed, because there has been error." (2020 PCR 1855-56).

Thompson argued that both lines of cases call into question the constitutionality of a death sentence, "[O]ne is about [] intellectual disability

and the other is about constitutional parameters of sentencing, but the Pool[e] decision and Phillips are two peas in a pod, if you will." (2020 PCR 1846).

Noting that this Court had already overturned the lower court's findings from 2015 because they relied on a hearing in 2009 that did not meet the constitutional requirements set out in Hall, Thompson argued below that the court could not follow the State's urging and reinstate the previously invalidated Order from either 2009 or 2015. Thompson argued that the U.S. Supreme Court's decision in Hall v. Florida remains good law and was not overturned by this Court's decision in Phillips; therefore, this Court's ruling from 2016 holding that Thompson is entitled to a hearing "to be conducted pursuant to the United States Supreme Court's holding in Hall and this Court's holding in Oats" stands. Thompson, 208 So. 3d at 60.

Despite this Court's clear holding in Thompson, 208 So. 3d 49, the lower court appeared to consider whether it could circumvent this Court's findings invalidating the Order. The Court inquired of Thompson, "Let me ask you, I'm sorry, to interrupt you [counsel], so what was the hearing in front of Judge Scola?" (2020 PCR 1848). Thompson again explained that "[this Court] has made a finding that that hearing was unconstitutional. . . ." (2020 PCR 1848-49). Subsequently, the Court asked the State, "In terms of - - so

as I found in the 2015 Order, did Judge Scola, even though it's premised on Cherry, her opinion, okay, in reality conduct the type of review that would meet the constitutional requirements under the law for an intellectual disability hearing." (2020 PCR 1857-58). The State responded, "absolutely," but then said, "we can't fully parse out whether Judge Scola took into consideration all of the factors of Hall." (220 PCR 1858).

The lower court granted the State's motion to reinstate the 2009 Order and denied Thompson's Rule 3.851 motion, finding that Thompson was no longer entitled to the evidentiary hearing required by this Court's mandate. (2020 PCR 1659).

Having been put on notice that the issue was pending before this Court, the lower court wrote that Thompson should file a motion to relinquish jurisdiction "should Okafor be decided while the appeal in this matter is pending, and if the Florida Supreme Court holds that the trial court cannot ignore a mandate." (2020 PCR 1660). As noted supra, the court below did not address any of the other arguments raised by Thompson.

On October 16, 2020, Thompson timely filed for rehearing and again requested the lower court to respond to all of the arguments he raised (2020 PCR 1662). Pursuant to Rule 3.851(f)(7), because the lower court took no action within 30 days of the filing of the motion for rehearing, the motion for

rehearing was deemed denied, and therefore final, on November 15, 2020. Ten days later, On November 25, 2020, this Court issued its opinion in Okafor.

On December 11, 2020, Thompson timely filed his Notice of Appeal; this Court issued its "Acknowledgment of New Case" on December 21st. Nine days later, on December 30, 2020, the lower court issued a two-sentence Order denying Thompson's motion for rehearing without addressing Thompson's seven remaining arguments (2020 PCR 1681). This appeal follows.

SUMMARY OF THE ARGUMENTS

1. This case is controlled by State v. Okafor, in which this Court squarely held, "[a] trial court is without authority to alter or evade the mandate of an appellate court absent permission to do so." 306 So. 3d at 935–36 (quoting Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp., 328 So. 2d 825, 827 (Fla. 1975)). Acting outside of its authority, the lower court ignored this Court's final mandate ordering it to conduct an evidentiary hearing "pursuant to the United States Supreme Court's holding in Hall and this Court's holding in Oats"[11] when it denied Thompson's Successive Rule 3.851 Motion to Vacate Judgments and Sentence.

[11] Thompson v. State, 208 So. 3d 49, 60 (Fla. 2016).

At the urging of the State, the lower court disregarded this Court's mandate and denied Thompson's motion determining that this Court's decision in Phillips v. State, 299 So. 3d 1013 (Fla. 2020) constituted a change in the law under which "Thompson is not entitled to relief" (2020 PCR 1660). The lower court found that "this matter was remanded for an evidentiary hearing based upon the decision in Walls[v. State, 213 So. 3d 340 (Fla. 2016]) that Hall[v. Florida, 574 U.S. 701 (2014)] was retroactive. As was recently determined, Walls is no longer good law." (2020 PCR 1659).

The lower court lacked the authority to disregard this Court's mandate; the mandate was final 120 days after it was issued and cannot be recalled or disregarded. Okafor, 306 So. 3d at 934-935.

Further, the lower court's reliance on Phillips is misplaced and does not affect the retroactive application of Hall to Thompson. Even if the exception to the law of the case doctrine allows for a lower court to disregard a mandate, the exceptions clearly do not apply here. Moreover, this Court remanded Thompson's case for an evidentiary hearing finding "this case [to be] a prime example of preventing a manifest injustice if we did not apply Hall to Thompson." Thompson, 208 So. 3d 49, 50. The lower court's disregard for this Court's mandate cannot stand and Thompson must be afforded "a fair opportunity to show that the Constitution prohibits [his]

execution." Id. at 60 (quoting Hall, 574 U.S. at 724).

2. The lower court did not have the authority to deny Mr. Thompson's claim of intellectual disability without conducting an evidentiary hearing that comports with the dictates of Hall, as mandated by this Court in 2017. Even if the lower court retained the authority to override a final judgment from this Court, which it does not, it cannot reinstate Judge Scola's 2009 Order which is premised entirely on the unconstitutional standard set forth in Cherry v. State, 959 So. 2d 702 (Fla. 2007), and it was inappropriate for the State to urge the court to do so. Despite the admonition from the Supreme Court of the United States reminding the States to place reliance on prevailing norms in the scientific and medical community when assessing intellectual disability in the forensic setting, the court below continued to rely on findings from the 2009 hearing which this Court has found "was tainted by the bright-line cutoff of 70 for IQ scores established by this Court in Cherry, which was abrogated by Hall." Thompson, 208 So. 3d at 58. The lower court's findings are constitutionally infirm and cannot stand, and to rely on the invalidated findings would violate fundamental principles of the Eighth Amendment and the Due Process clause of the Fourteenth Amendment.

If given the hearing that comports with the requirements of Hall that Thompson is entitled to, he would present evidence that he is intellectually

disabled under sound clinical and legal standards. To deny him this meaningful opportunity would violate his Fifth and Eighth Amendment rights and create an undue risk that the State of Florida will execute an intellectually disabled person. The lower court's judgment must be vacated and Thompson's case remanded for evidentiary development as required by this Court's February 6, 2017 mandate.

3. Applying this Court's ruling in Phillips v. State to Mr. Thompson's case will result in a death penalty system that violates the Eighth Amendment prohibition against arbitrary imposition of the death penalty and equal protection of the laws. Thompson cannot be denied the due process afforded to other similarly situated death sentenced litigants. Thompson raises arguments concerning the equal application of Hall v. Florida in intellectual disability claims as well as the equal application of State v. Okafor concerning the finality and irrevocability of an appellate court's duly-issued mandate. Here, this Court cannot offer any non-arbitrary and rational reasons to deny relief.

4. The holding in Phillips v. State amounts to an ex post facto change in the law.

5. This Court in Phillips erred in holding that Hall announced a new non-watershed rule of Federal Eighth Amendment law for purposes of

Teague v. Lane and Witt v. State.

6. Phillips v. State is predicated upon an erroneous understanding of the decision in Hall v. Florida.

STANDARD OF REVIEW

The lower court's error in summarily denying Thompson's Rule 3.851 motion without an evidentiary hearing is "a pure question of law and is subject to de novo review." Tomkins v. State, 994 So. 2d 1072, 1081 (Fla. 2008) (citing Rose v. State, 985 So. 2d 500, 505 (Fla. 2008)).

Additionally, factual determinations "induced by an erroneous view of the law" should be set aside. Holland v. Gross, 89 So. 2d 255, 258 (Fla. 1956); See also Central Waterworks, Inc. v. Town of Century, 754 So. 2d 814 (Fla. 1st DCA 2000).

ARGUMENT

Introduction

In 2002, the United States Supreme Court held in Atkins v. Virginia that the Eighth and Fourteenth Amendments prohibit a state from executing an individual who is intellectually disabled. 536 U.S. 304. The Court, however, left to the states the task of defining intellectual disability. Id. In 2007, this Court issued Cherry, which set Florida as an outlier in death penalty jurisprudence by imposing an unscientific cutoff requiring a capital defendant to present an IQ of 70 or below as a necessary fact to be proven in order to

obtain a full evidentiary hearing and be found intellectually disabled.

Seven years later, the U.S. Supreme Court held, in Hall, that Florida's "rigid rule," as set out in Cherry, of an IQ cutoff of 70 "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." 572 U.S. 701, 704 (2014). Prior to the issuance of Hall, intellectually disabled capital defendants around the State, including Thompson, had all been denied relief under Cherry.[12]

After the issuance of Hall, this Court remanded Mr. Hall's case for the imposition of a life sentence, Hall v. State, 201 So. 3d 628 (Fla. 2016), and also remanded Haliburton in light of Haliburton v. Florida, 574 U.S. 801

[12] Indeed, the Cherry opinion and the rule it announced have been widely criticized by legal scholars and experts in intellectual disability. See John H. Blume et. al., Of *Atkins* and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases, 18 Cornell J.L. & Pub. Pol'y 689, 697 (2009) ("Cherry illustrates a recurring problem after Atkins: the failure of courts to apply the standard error of measurement and other practice effects to all IQ scores."); James W. Ellis, Caroline Everington, and Ann M. Delpha, Evaluating Intellectual Disability: Clinical Assessments in *Atkins* Cases, 46 Hofstra L. Rev. 1305, 1357-60 (2018); Lois A. Weithorn, Conceptual Hurdles to the Application of *Atkins v. Virginia*, 59 Hastings L. J. 1203, 1228-34 (2008); Sarah E. Warlick and Ryan V.P. Dougherty, *Hall v. Florida* Reinvigorates Concept of Protection for Intellectually Disabled, 29-Winter Criminal Justice 4 (2015). 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 intellectual disability cases identified, every single case had been denied on the merits.)

(2014). Haliburton v. State, 163 So. 3d 509 (Fla. 2015). Additionally, other intellectually disabled capital defendants, like Thompson, filed successive 3.851 motions premised on Hall, which were denied by the lower court. On appeal, this Court held that in "light of developments in the law since Hall," when a "circuit court erred in its legal analysis regarding the onset of [a defendant's] intellectual disability prior to the age of 18 and failed to consider all of the evidence presented," remand for a "full reevaluation" of intellectually disability is appropriate. Oats v. State, 181 So. 3d 457, 458–59 (Fla. 2015) (citations omitted).

Mr. Thompson fell into this category and this Court entered an opinion remanding his case to the circuit court for a "new evidentiary hearing on intellectual disability pursuant to the United States Supreme Court's holding in Hall and this Court's holding in Oats." Thompson, 208 So. 3d at 51. This Court issued its mandate on February 6, 2017 (2020 PCR 299).

One month prior to remanding Thompson's case, in October 2016, this Court determined that Hall was retroactive to cases where death-sentenced individuals had timely raised intellectual disability as a bar to execution. Walls v. State, 213 So. 3d 340 (Fla. 2016).

Following the retirement of four Justices who formed the majority in Walls, a newly constituted Court *sua sponte* revisited Walls in Phillips v.

State, 299 So. 3d 1013 (Fla. 2020). The majority receded from Walls and held that "because Hall does not apply retroactively, it does not entitle Phillips to a reconsideration of whether he meets the first prong of the intellectual disability assessment." Id. at 1017.

Just months before this Court issued Phillips, the newly constituted Court also issued Poole v. State, 297 So. 3d 487 (Fla. 2020) in which this Court receded from Hurst v. State, 202 So. 3d 40 (Fla. 2016). The State then filed motions in multiple cases asking trial courts to reinstate vacated death sentences in light of the change of the law set out in Poole.

Taking a cue from the motions based on Poole, the State, on June 19, 2020, more than three years after this Court issued its mandate, filed a motion to reinstate the 2009 Order, dismiss Thompson's pending motion, and deny him an evidentiary hearing on the basis of Phillips.

On November 25, 2020, this Court issued Okafor holding that neither this Court nor a lower court can undo or disregard a duly-issued mandate more than 120 days after the issuance of the mandate.

I. The lower court erred as a matter of law when it disregarded this Court's final judgment and mandate ordering an evidentiary hearing.

The lower court was without authority to disregard this Court's mandate commanding it to conduct an evidentiary hearing on Thompson's intellectual

disability claim. Okafor, 306 So. 3d 930.

a. The lower court lacked the authority to disregard a duly-issued mandate.

This case, like Okafor, is "ultimately about the finality of [this] Court's judgment resolving [Thompson's] appeal." Okafor, 306 So. 3d at 933. In Okafor, this Court reaffirmed that where an appellate court issues a mandate, "it is a bedrock principle" that the judgment is final. Okafor, 306 So. 3d at 933 (citing O.P. Corp. v. Village of North Palm Beach, 302 So. 2d 130, 131 (Fla. 1974)). Compliance by the lower courts "is a purely ministerial act." O.P. Corp., 302 So. 2d at 131. "An appellate court decision ordinarily becomes final when the appellate court issues a document known as a mandate." Id. (quoting Philip J. Padovanao, Florida Appellate Practice § 20:8 (2020 ed.)).

Three plus years later, neither the lower court nor this Court can withdraw the final mandate or disregard this Court's final judgment. Okafor, 306 So. 3d at 933-34 (A mandate becomes final and cannot be "recalled more than 120 days after its issuance."); See also Fla. R. App. P. 9.340 (a); Fla. R. Jud. Admin. 2.205 (b)(5); § 43.44, Fla. Stat. (2014); and In re Amendments to the Florida Rules of Judicial Administration and the Florida Rules of Appellate Procedure, 125 So. 3d 743 (Fla. 2013). The "law constrains" this Court's ability to render a different judgment once a mandate is final and prohibits a lower court from disregarding the same. Okafor, 306

So. 3d at 933.

In 2017, this Court vacated Mr. Okafor's death sentence in light of Hurst v. State, 202 So. 3d 40 (Fla. 2016), and remanded for resentencing. Long after the 120-day window expired and the mandate became final, this Court issued Poole v. State, 297 So. 3d 487 (Fla. 2020), in which this Court receded from Hurst v. State. The State moved to reinstate Okafor's death sentence "because Poole took away the legal basis for [the] vacatur of that sentence and because the sentence would have been constitutional under the correct rule announced in Poole." Okafor, 306 So. 3d at 931. Because more than 120 days had passed since the issuance of the mandate in Okafor's case, this Court recognized that it was without any "available legal means" to undo its final judgment. Id. at 934.

Thompson stands in the same posture. The mandate the State successfully moved the lower court to disregard in this case issued February 6, 2017 and became final 120 days later, on June 6, 2017. A court lacks the authority to withdraw the mandate without violating long-established Florida statutory and decisional law, and rules on the finality of appellate judgments. Id. Neither the lower court nor this Court can undo that final judgment and preclude Thompson from the evidentiary development this Court previously ordered without running afoul of those laws and rules.

At the State's urging, the lower court believed it was permitted to disregard this Court's mandate (2020 PCR 1659-60), although the court clearly recognized that perhaps it was mistaken,

> Again, this Court's finding and order is not to be interpreted as a lack of respect for the November 2016 order entered by the Florida Supreme Court.
>
> . . .
>
> In the alternative, should *Okafor* be decided while the appeal in this matter is pending, and if the Florida Supreme Court holds that that the trial court cannot ignore a mandate, the parties could also file a motion to relinquish jurisdiction and this court would proceed to conduct another evidentiary hearing on Mr. Thompson's intellectual disability claim.

(2020 PCR 1660) (footnote omitted); (2020 PCR 1659) ("This Court has the utmost respect for our Supreme Court of Florida and would not willfully violate a mandate").

A trial court cannot alter or evade the mandate of an appellate court absent permission to do so, that permission cannot be simply inferred. Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp., 328 So. 2d 825, 827 (Fla. 1975) (citing Cone v. Cone, 68 So. 2d 886 (Fla. 1953).

b. A final mandate cannot be withdrawn or disregarded even if the law upon which it is based changes.

To the extent the State may assert that this Court's decision to recede from Walls in Phillips v. State amounted to a change in the law of

Thompson's case, that argument is equally unavailing. In Florida, it is clearly established that all questions of law which have been decided by the highest appellate court become the law of the case which, *except in extraordinary circumstances,* must be followed in subsequent proceedings, both in the lower and the appellate courts." Brunner Enterprises, Inc. v. Dep't of Rev., 452 So. 2d 550, 552 (Fla. 1984); See also State v. Owen, 696 So. 2d 715, 720 (Fla. 1997); Okafor, 306 So. 3d 930. The lower court can depart from the "law of the case when there has been 'an intervening decision by a higher court contrary to the decision reached on the former appeal.'" Okafor, 306 So. 3d at 934 (quoting Strazzulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965)).

The exceptions to the law of the case doctrine concern the changing of decisions regarding "questions of law" that underlie a judgment. Okafor, 306 So. 3d at 934-35. The exceptions "do not speak to" revisiting a final judgment. Id. at 934 ("Rather, the petition asks us to revisit and undo a final judgment. The exceptions to the law of the case doctrine do not speak to that issue"). An intervening change in the law cannot undo a final judgment.

The lower court's reliance on three recent decisions[13] from this Court

[13] Below, the State presented Marshall v. State, No. 2D16-1095, 2019 WL 5296709 (Fla. 2d DCA Oct. 18, 2019) and Morales v. State, 580 So. 2d 788 (Fla. 3d DCA 1991), for the premise that a lower court can ignore a duly-issued mandate "when it is undoubtedly certain that the basis for the mandate has been subsequently overruled before the trial court can comply

in support of its decision to disregard the mandate and deny relief is misplaced. This Court's rulings in Lawrence v. State, 296 So. 3d 892 (Fla. 2020) (Mem), petition for cert. filed, (No. 20-6307). Cave v. State, 299 So. 3d 552 (Fla. 2020), petition for cert. filed, (No. 20-6947), and Freeman v. State, 300 So. 3d 591 (Fla. 2020), petition for cert. filed, (No. 20-6879) are not controlling or even instructive here - none of the three cases were pending before the lower court on a final mandate from this Court and none undid Thompson's mandate in his case. Additional meaningful factual and procedural differences also distinguish these cases from the instant matter. Lawrence, whose case became final in 1998, did not assert an intellectual disability claim until 2018, well after Atkins and Hall were issued. Similarly, Cave's case became final in 1999, yet he failed to file an intellectual disability claim until 2017. Likewise, Freeman, whose sentence became final in 1990, failed to timely raise an intellectual disability claim until after Walls was issued. None of the three litigants timely raised or litigated Atkins challenges, nor did they timely raise Hall challenges. This Court's ruling that Hall is not retroactive to these three defendants is irrelevant to the instant matter.

with the mandate." (2020 PCR 1624). The lower court did not rely on either in its Order; however, in Okafor, this Court rejected reliance on both cases, because neither "addressed the finality of judgment principle that we discuss here, and neither involved the detailed statutory procedures that govern sentencing in death penalty cases." 306 So. 3d at 934, n. 2.

Even if there were no final mandate, this Court has held that a change in the law of the case should only be made in those situations where strict adherence to the rule would result in "*manifest injustice*." Brunner, 452 So. 2d at 552–53 (quoting Strazzulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965)). But that is not the case here. On the contrary, this Court held the precise opposite four years ago, "Not only have we determined that Hall is retroactive utilizing a Witt analysis, Walls v. State, to fail to give Thompson the benefit of Hall, which disapproved of Cherry, *would result in a manifest injustice"* Thompson, 208 So. 3d at 50 (parenthetical omitted) (emphasis added).

This Court has already determined that "this case is a *prime example* of preventing a manifest injustice if we did not apply Hall to Thompson." Id. at 50-51 (emphasis added).[14] Thompson's case was remanded for evidentiary development to prevent a manifest injustice. This Court's decision in Walls concerning retroactivity does not invalidate this Court's duly-issued mandate in this case, nor does it nullify this Court's ruling that to

[14] The lower court is under the mistaken impression that "the Defense argued that it would be a manifest injustice to denying (sic) Mr. Thompson his opportunity to have a full hearing. . ." Thompson merely attempted to notify the lower court of this Court's findings, and continued to remind the lower court that the language is from this Court's opinion – "to fail to give Thompson the benefit of Hall, which disapproved of Cherry, would result in a manifest injustice, which is an exception to the law of the case doctrine." Thompson, 208 So. 3d at 50 (citations omitted).

deny Thompson an evidentiary hearing would be a manifest injustice. The lower court chose to both disregard this Court's duly-issued mandate *and* this Court's clear concerns of manifest injustice in denying Thompson's claim.

c. The plain language of established procedural rules governing capital postconviction proceedings prohibit a court from undoing a final judgment.

The rules of criminal and appellate procedure strictly prescribe the limits and conditions under which the State or a trial court can reconsider judgements in postconviction proceedings. Rule 3.851 provides clear time limits in challenging the grant or denial of postconviction relief, and once the time frame closes, the judgment is final and the State is procedurally barred from raising any challenges. See also State v. Jackson, 306 So. 3d 936 (Fla. 2020).

This Court's decision in State v. Jackson, the companion case to Okafor, squarely reaffirms the plain reading of the rule,

> As an initial matter, under rule 3.851(f)(5)(F), a postconviction court's order that "resolve[s] all the claims raised in the motion" is expressly referred to as "the final order for purposes of appeal," not as a nonfinal order that is nevertheless appealable. The order at issue here is a "final order" under rule 3.851.

Id. at 940.

In 2017, Mr. Jackson filed a successive Rule 3.851 motion pursuant to

this Court's decision in Hurst v. State. Id. 938. The lower court vacated Jackson's death sentence and granted a new penalty phase. Id. The State did not appeal. Id. Three years later, the State moved the lower court to reinstate Jackson's death sentence following this Court's opinion in Poole. Finding that it "lack[ed] jurisdiction to reconsider" its own final Order vacating Jackson's sentence, the lower court denied the motion. Id. at 938. The State filed an All Writs Petition and Petition for Writ of Prohibition. This Court held that an Order disposing of a motion under Florida Rules of Criminal Procedure 3.851 is a final order and cannot be challenged beyond the strict time limits expressed in the rule. Id.

Here, Thompson appealed the lower court's denial of relief, and this Court vacated that denial and entered an Order remanding the case for an evidentiary hearing. Pursuant to Rule 3.851 and this Court's opinion in Jackson, this Court's ruling is a final order. The State's challenge three years later is time-barred by Fla. R. Crim. P. 3.851. Id. at 940; see also Fla. R. Crim. P. 3.851.

The fact that this Court's Order remanded this case for further proceedings does not change the finality of Thompson's postconviction relief. Id. at 941. Quoting Taylor v. State, 140 So. 3d 526, 528 (Fla. 2014), this Court in Jackson reaffirmed "that an order disposing of a postconviction

motion which partially denies and partially grants relief is a final order for purposes of appeal, even if the relief granted requires subsequent action in the underlying case, such as resentencing." Id.

This Court's opinion in Jackson clarifies that the grant of postconviction relief itself is final and irrevocable. Indeed, even if decisional law "has completely 'undercut the premise upon which'" the prior order was vacated, a lower court does not have the authority to set aside a final judgment. Id. at 943; see also State v. Owen, 696 So. 2d 715, 720 (Fla. 1997).

Moreover, this Court has routinely held that condemned inmates cannot relitigate in Rule 3.851 proceedings claims that the court adjudicated against them on direct appeal (e.g., Lukehart v. State, 70 So. 3d 503, 524-525 (Fla. 2011); Schoenwetter v. State, 46 So. 3d 545, 561, 562 (Fla. 2010); Johnston v. State, 27 So. 3d 11, 28-29 (Fla. 2010); Allen v. State, 854 So. 2d 1255, 1261-1262 (Fla. 2003); Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323 (Fla. 1994)) or in prior postconviction proceedings (e.g., Rivera v. State, 260 So. 3d 920, 928 (Fla. 2018); Lynch v. State, 254 So. 3d 312, 323 (Fla. 2018); Van Poyck v. State, 116 So. 3d 347, 362 (Fla. 2013); Reed v. State, 116 So. 3d 260, 268 (Fla. 2013); Grossman v. State, 29 So. 3d 1034, 1042 (Fla. 2010); Hill v. State, 921 So. 2d 579, 585 (Fla. 2006); Owen v. State, 773 So. 2d 510, 515 n. 11 (claim 10) (Fla. 2000)). Rule 3.851(e)(2)

embodies a similar procedural bar. ("A claim raised in a successive motion shall be dismissed if the trial court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits").

To continue to enforce these procedural-bar rules against defendants but ignore them when the State asks the lower court to about-face, reopen and reverse a decision that this Court rendered in a defendant's favor on appeal, would violate the doctrine of Wardius v. Oregon, 412 U.S. 470, 474 (1973) (the federal Due Process Clause "does speak to the balance of forces between the accused and his accuser."); See also, e.g., United States v. Bahamonde, 445 F.3d 1225 (9th Cir. 2006); Mauricio v. Duckworth, 840 F.2d 454, 457-458 (7th Cir. 1988); Camp v. Neven, 606 Fed. Appx. 322, 326 (9th Cir. 2015); State v. Wooten, 260 So. 3d 1060 (Fla. 4th DCA 2018) ("Due process . . . requires that discovery 'be a two-way street.' Wardius . . . at 475. . . .").

The teaching of Wardius is that if significant procedural tools or benefits are made available to State's attorneys, litigants against the State must be given the same or similar tools or benefits. See State v. Reimonenq, 286 So. 3d 412 (La. 2019). See also Evans v. Superior Court, 522 P.2d 681 (Cal. 1974) (giving defendants a state constitutional due process right to a pretrial order requiring the prosecution to conduct a lineup); People v. Mena,

277 P.3d 160 (Cal. 2012) (adhering to Evans despite post-Evans legislation that might have been read as limiting defense discovery to statutorily enumerated procedures that do not include lineups); and see United States v. Ash, 413 U.S. 300, 309 (1973) (noting the Sixth Amendment's concern against "the imbalance in the adversary system that otherwise [that is, without defense counsel] resulted with the creation of a professional prosecuting official"). To allow the lower court to shrug off Thompson, 208 So. 3d 49, as though it never happened would make a mockery of Wardius.

There are no circumstances that allow either this Court or the lower court to ignore established law and undo final judgments, not even the reasons asserted by the State that "conduct[ing] such a hearing would be an exercise in futility as it runs contrary to current law and other practical policy considerations such as judicial economy and promoting finality." (2020 PCR 1553). The same arguments were presented and squarely rejected in Okafor, "[t]hese considerations, however compelling, do not give us license to exceed legal constraints on our authority." 306 So. 3d at 935. Concerns of judicial economy and finality cannot override a capital defendant's timely request to present evidence establishing that he is categorically barred from a sentence of death, nor is it a proper basis to ignore a mandate.

The substantive law has not changed. Capital defendants are still

entitled to certain Eighth Amendment protections – i.e. against being executed if intellectually disabled – thus enforcing the mandate in this case is not comparable to enforcing an unlawful or unconstitutional order. Thompson is still constitutionally entitled to a determination of whether he is intellectually disabled, and thus, a determination of whether he may be executed. Thompson is entitled to the hearing this Court Ordered and the lower court's unauthorized Order should be vacated.

II. **The lower court erred when it denied Mr. Thompson's Rule 3.851 motion without conducting the mandated evidentiary hearing and thus failed to assess Thompson's intellectual disability claim under sound clinical and legal standards as required by the Fifth and Eighth Amendments. Acting outside of its authority, the lower court improperly reinstated previously invalidated and constitutionally infirm findings, thereby creating an undue risk that the state of Florida will execute an intellectually disabled person.**

The Eighth Amendment commands this Court to ensure that no persons with intellectual disability are executed, "for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." Hall at 708. To protect this vulnerable class of defendants, capital sentencing procedures must be consistent with the "evolving standards of decency that mark the progress of a maturing society," Atkins at 304; otherwise, they violate the Eighth Amendment, See

Woodson v. North Carolina, 428 U.S. 280 (1976), Roberts v. Louisiana, 428 U.S. 325, 332- 33 (1976), as do capital sentencing procedures that are inconsistent with the consensus of contemporary practice in the nation. Beck v. Alabama, 447 U.S. 625, 635 (1980).

The very rule in Cherry undermined the reliability of Florida's capital sentencing scheme. The Cherry analysis contravened medical and scientific research and practices and used a bright-line cut off in attempting to determine a diagnosis that requires a complex and layered approach. See Hall, 572 U.S. 701.

> Intellectual disability is a condition, not a number. See DSM–5, at 37. Courts must recognize, as does the medical community, that the IQ test is imprecise. This is not to say that an IQ test score is unhelpful. It is of considerable significance, as the medical community recognizes. But in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number.

Id. at 723.

An analysis that "ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability." Id. The decision in Hall highlighted the very concerns of such a practice,

> [p]ursuant to this mandatory cutoff, sentencing courts cannot consider even substantial and weighty

> evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances.

Id. at 712.

Thompson's case lies at the very core of Hall's ruling and the Eighth Amendment prohibition against the execution of the intellectually disabled. The circuit court denied Thompson's claim doing precisely what Hall prohibits: relying solely on an IQ score above 70 to preclude a finding of intellectual disability.

Due Process and fundamental fairness are critical to the integrity and reliability of capital litigation. Where the stakes are the highest and the sentence is the gravest our society can impose, courts must be ever vigilant in protecting the procedural rights of those litigants. The shift in the law required by our nation's evolving standards of decency obligated the lower court to look to established medical and scientific practices and examine Thompson's case in a holistic manner. The court failed to do so.

a. The lower court cannot reinstate the previously invalidated Order from 2009 and deny Mr. Thompson's claim without conducting the mandated evidentiary hearing without running afoul of the Eighth Amendment.

As presented *supra* in **Argument I**, the lower court did not have the

authority to deny Thompson's claim of intellectual disability without conducting an evidentiary hearing that comports with the dictates of Hall, as mandated by this Court, and it cannot reinstate the circuit court's previously invalidated findings. To do so runs a grave risk that the State of Florida will execute an intellectually disabled person.

Notably, the State took the position below that "we are not at all in a situation anything like a Hurst error where a defendant may be wrongfully executed, because there has been error" (2020 PCR 1855-56). The State's argument must fail. The execution of someone who is intellectually disabled, and therefore, categorically precluded from a sentence of death under the Eighth Amendment, would indeed be the definition of a wrongful execution and would undermine the foundation of reliability needed to justify a capital sentencing scheme.

b. The lower court erred when it relied on Judge Hogan-Scola's findings from 2009 which are premised on the unconstitutional standard set in Cherry v. State, and therefore, constitutionally infirm.

Below, the State urged the court to "reinstate" Judge Hogan-Scola's Order from 2009, arguing that the Order was "controlling," and suggesting that because it was previously upheld by this Court in 2010, it is reliable (2020 PCR 1551). The State was wrong to encourage the court to do so (2020 PCR 1839, 1840).

In 2010, this Court upheld the lower court's 2009 order based on an objectively unreasonable application of clearly established federal law as set out by the Supreme Court of the United States, "It is clear that Thompson's previous hearing on intellectual disability was tainted by the bright-line cutoff of 70 for IQ scores established by this Court in Cherry, which was abrogated by Hall." Thompson v. State, 208 So. 3d 49, 58 (Fla. 2016).

There is no question that the lower court, and this Court in 2010, made a determination on Thompson's intellectual disability claim based solely on a now-unconstitutional standard: "there is competent, substantial evidence to support the circuit court's factual findings that Thompson is not mentally retarded, *based on this Court's definition of the term as set forth in Cherry*," Thompson 41 So. 3d at 210. (emphasis added). In 2015, the lower court again issued an order denying Thompson's motion relying solely on the 2009 hearing and findings (See 2020 PCR 131). On appeal, this Court unequivocally determined that Thompson had been deprived of a full and fair hearing,

> Simply put, it is impossible to know the true effect of this Court's holding in Cherry on the circuit court's review of the evidence presented at Thompson's intellectual disability hearing, particularly on Thompson's range of IQ scores from 71–88. What is clear is that this Court instructed the circuit court to conduct Thompson's intellectual disability hearing pursuant to Cherry, a case that has since been

> abrogated by the United States Supreme Court in Hall. The circuit court took Cherry into consideration at Thompson's intellectual disability hearing and in denying Thompson's intellectual disability claim, and this Court relied on Cherry to affirm the circuit court's order. Because of this reliance on Cherry's bright-line cutoff of 70 for IQ scores, Thompson has yet to have "a fair opportunity to show that the Constitution prohibits [his] execution." Hall, 134 S. Ct. at 2001.

Thompson, 208 So. 3d at 60.

It is also impossible for the lower court to rely on the record from 2009 in making its own determination. This Court highlighted that the 2009 hearing - the record the lower court stated it relied on in 2015, and again in 2020 - was "tainted" by the unconstitutional standard in Cherry. Id. at 60. Judge Scola conducted the hearing applying the dictates of Cherry, and made critical decisions on the relevance and admissibility of evidence based on an unconstitutional standard. Id.

Neither the prior hearing nor the current lower court's analysis can be considered valid or reliable in assessing Thompson's Eighth Amendment claim. Yet, the lower court did so:

> "In terms of - - so as I found in the 2015 Order, did Judge Scola, even though it's premised on Cherry, her opinion, okay, in reality[,] conduct the type of review that would meet the constitutional requirements under the law for an intellectual disability hearing.

(2020 PCR 1857).

The court below adopted the State's argument and relied on the "tainted" record and findings from the 2009 hearing,

> In this regard, however, this Court believes that Mr. Thompson has had the full, comprehensive evidentiary review of his claim before a predecessor Judge, and, thereafter, by this Court, who relied on the entire record and transcript of the prior proceeding, heard additional witness testimony[15] and additional argument and assessed Mr. Thompson's intellectual disability claim under the requisite legal and constitutional standard.

(2020 PCR 1659).

> Defendant Thompson had a full and complete evidentiary hearing. He presented evidence on all three prongs. See Judge Scola's order attached as an exhibit to the State's Motion for Reconsideration. The Florida Supreme Court agreed. Thompson v. State, 41 So.3d 219 (Fla. 2010).

(2020 PCR 1660, n. 2).

The lower court erred in reinstating an Order this Court invalidated four years ago because it failed to meet constitutional requirements in capital sentencing.

[15] The lower court did not did not hear any "additional witness testimony" because it did not conduct an evidentiary hearing on Thompson's intellectual disability claim. (2020 PCR 1659). On January 29, 2018, the lower court heard testimony from experts concerning the issue of whether the court would allow Thompson to video, audio, or by stenography, record IQ testing conducted by the State expert (See 2020 PCR 1075-1368). This limited hearing did not at all address the merits of Thompson's intellectual disability.

c. If granted the hearing this Court previously mandated, Thompson will present evidence establishing that he is intellectually disabled and constitutionally excluded from execution under Atkins v. Virginia, Hall v. Florida and the Eighth Amendment of the United States Constitution.

Thompson is categorically excluded from eligibility of a death sentence because he suffers from intellectual disability. Evidentiary development, considered under constitutional standards, will show he meets the criteria set out in Florida Statutes section 921.137(1), "as he has significantly subaverage general intellectual functioning[,] existing concurrently with deficits in adaptive behavior[,] and manifested during the period from conception to age 18." If granted the evidentiary development he is entitled, Thompson will establish the following facts.

i. School officials identified and documented Thompson as intellectually disabled prior to 18

School records establish Thompson's intellectual disability began at birth. See Thompson, 208 So. 3d at 52 ("Testifying from school records, an elementary school principal stated that Thompson had an IQ of seventy-five, had been recommended for special educational placement, and had been a follower, not a leader."). Thompson took the Stanford-Binet IQ test in 1958, when he was five years old, achieving a full-scale IQ score of 75. Id. at 59. Subsequent testing in school corroborated that score.

At nine years old, in the third grade, school officials found Thompson

eligible for EMR classes (2009 T1 39, 70). He could only take advantage of EMR classes for a small portion of his education. In fourth grade, his family moved and his new school didn't offer special education (2009 T1 39, 44). Without the support, Thompson obtained Ds and Fs in main stream classes (2009 T1 40). Thompson was held back three times but also frequently "placed" in the next grade when he could not pass the curriculum (2009 T1 50). By the time he was in the eighth grade, Thompson was 18 while his classmates were 14 (2009 T1 50). He dropped out of school before ninth grade. Thompson's school records and school-age IQ tests clearly demonstrate that he suffered from the onset of intellectual disability before the age of 18.

ii. Thompson has deficits in Adaptive Functioning

Florida Rule of Criminal Procedure 3.203(b) provides that, "[t]he term 'adaptive behavior,' for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." See also AMERICAN PSYCHOLOGICAL ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 38 (5th ed. Text Rev. 2013) (1952) [hereinafter DSM-5].

The medical and scientific community describe adaptive behavior as

"the collection of conceptual, social, and practical skills that are learned and performed by people in their everyday lives." American Association on Intellectual and Developmental Disabilities Definitions, https://www.aaidd.org/intellectual-disability/definition (last visited July 21, 2020) [hereinafter AAIDD];[16] See also DSM-5, supra. Intellectually disabled individuals will show significant deficits in at least *one* of three areas:

- Conceptual skills—language and literacy; money, time, and number concepts; and self-direction.
- Social skills—interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), social problem solving, and the ability to follow rules/obey laws and to avoid being victimized.
- Practical skills—activities of daily living (personal care), occupational skills, healthcare, travel/transportation, schedules/routines, safety, use of money, use of the telephone.

AAIDD, supra; see also DSM-5, supra.

When assessing this prong, the focus must be on the defendant's deficits not his strengths. Moore v. Texas, 137 S. Ct. 1039, 1050 (2017) (recognizing "the medical community focuses the adaptive-functioning

[16] The AAIDD is the leading professional association concerned with the diagnosis and treatment of intellectual disability.

inquiry on adaptive deficits" and criticizing state court for "overemphasiz[ing] Moore's perceived adaptive strengths" such as the fact that Moore "lived on the streets, mowed lawns, and played pool for money").

As illustrated in documents filed with the lower court in preparation for the 2020 hearing, it was shown that Thompson suffered from deficits in adaptive functioning at a very young age. Thompson's mother, Helen Thompson[17] described her son as "slow" and "entirely different" from his siblings (2020 PCR 1600). She explained that he required daily instruction and direction to perform basic hygiene tasks (2020 PCR 1600). Thompson could not read or manage money and did not play games like the other children (2020 PCR 1600). His father singled Thompson out for emotional and physical abuse so severe he developed a facial tic whenever his father was around (1996 PCR 166). Despite this, he was friendly and eager to please (1996 PCR 166).

Bill Weaver, Thompson's childhood teacher and also later Principal and Director of Special Education in the Liking Valley School District in Ohio, described him as the "most academically challenged child I had." Thompson, 208 So. 3d. at 55. He noted that Thompson performed well below expected grade level, was poorly coordinated and clumsy (2020 PCR 1600).

[17] Helen Thompson passed away in 2019.

A friend from childhood, Glen Anderson remembered that Thompson was in special education, described him as “slow,” and said other children bullied Thompson (2020 PCR 1601).

Even Barbara Garritz,[18] who was present in the hotel room when Surace and Thompson murdered Miss Ivester but was too afraid to leave and subsequently was charged as a co-defendant, described Thompson as “a big, easy going child.” (R3 507)[19]. She remembered Thompson “had to work a lot harder to be accepted than most people because he was so simple,” noting “he would sometimes get frustrated by his inability to think and communicate like other people.” (R3 507). Garritz noted, that it “was hard to carry on a normal conversation with him, as he just couldn’t think quick enough to keep up, and he never seemed to have an idea of his own.” (R3 507).

> Bill would talk to somebody for ten minutes, and would come away convinced that whatever that person had just told him was the absolutely gospel truth, no matter how stupid or obviously false it was. Anybody with just a little bit of sense could wrap Bill around their little finger – he would do just about anything he was told. You couldn’t help but like Bill, though, because he was so open and easy going and

[18] Barbara Garritz is referred to in many of the records in this case by her maiden name, Barbara Savage.

[19] Affidavit of Barbara Garritz, June 16, 1987, admitted as Defendant’s exhibit D at Thompson’s 1989 sentencing.

eater to be liked.

(R3 507). Garritz described Surace as "an evil man, sometimes I think he was the devil himself," who "knew how to manipulate people and use them to his own advantage." (R3 506, 508). "When you were with Rocky, you followed his orders." (R3 506). Garritz acknowledged that she "both feared and was attracted to him at the same time." (R3 506). Calling him "Rocky's opposite," Garritz described Thompson as gullible and easily manipulated and believed he was "completely under Rocky's spell" (R3 508). She also "fell under his spell" and "sincerely wish[ed] that [she] had never met Rocky Surace." (R3 506).[20]

The State's expert, Gregory Prichard, Psy.D., has never administered an adaptive deficit testing instrument regarding Thompson or conducted an in-depth interview to ascertain context about his background. Indeed, in 2009, Dr. Prichard testified that he didn't conduct any adaptive deficits analysis because he believed Thompson failed under Cherry. Thompson, 208 So. 3d at 56. In his report, Prichard failed to note the significant deficits Thompson demonstrated in school including the times he was held back, or

[20] Although the information from Barbara Garritz was known and a part of early records, Thompson has not had the opportunity to present this evidence in conjunction with other records and testimony in support of his intellectual disability claim.

the key findings regarding Thompson's attention and learning problems as early as the first grade (2020 PCR 1600).

Prichard based his 2009 opinion[21] on "'common-sense,' his interactions with Thompson, and a review of Thompson's records" to opine that Thompson was not intellectually disabled because of his "ability to enlist in the Marines, obtain his GED, and work as a security guard, cook, roofer and truck driver." Thompson, 203 So. 3d at 56. However, a deficit is not cancelled out by a strength. A deficit is a deficit. See Moore, 137 S. Ct. 1039. Thompson would be able to present expert testimony establishing that Dr. Prichard's reliance on anecdotal strengths is improper in a scientifically-sound, and constitutionally valid assessment of intellectual disability. Id.

In 2017, in anticipation of the impending hearing, Defense expert Robert Ouaou, Ph.D. conducted interviews of some of the same witnesses as Dr. Sultan, who testified in the previous hearing, plus a childhood friend Glen Anderson. In these interviews, Dr. Ouaou utilized the Adaptive Behavior Diagnostic Scale ("ABDS") (2016), a testing instrument to

[21] In 2019, after much litigation over Prichard's refusal to allow defense counsel to observe or videotape him administer any testing, Prichard re-interviewed Thompson; however, even though videotaping was precluded, Prichard still did not conduct any IQ or adaptive deficit testing. Defense counsel and their expert were allowed to observe through close circuit television. Prichard's recent assessment is not part of the record as the State neglected to file it with the court as required by Rule 3.851(f)(6).

determine the presence and magnitude of adaptive deficits.[22] Dr. Ouaou concluded that Thompson exhibits clear deficits in adaptive functioning. Ouaou opined that the deficits are severe (2020 PCR 1601). Thompson has not been able to present this key expert testimony.

iii. Thompson has established significant deficits in intellectual functioning with IQ scores in the Intellectually Disabled range

Valid tests administered by qualified professionals establish that Thompson has significant deficits in intellectual functioning consistent with being mildly Intellectually Disabled. "Mild levels of intellectual disability . . . nevertheless remain intellectual disabilities," and Florida "may not execute anyone in 'the entire category of [intellectually disabled] offenders." Moore, 137 S. Ct. at 1051 (emphasis added) (quoting Roper v. Simmons, 543 U.S. 551, 563-64 (2005)). Florida statutory law defines intellectual disability as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifesting during the period from conception to age 18." Fla. R. Crim. P. 3.203(b). "Significantly subaverage general intellectual functioning" is understood as "performance that is two or more standard deviations from the mean score on a

[22] The ABDS meets the contemporary standards for standardization, reliability, and validity in the measurement of adaptive behavior.

standardized intelligence test." Id. Because the mean score of an IQ test is 100, an IQ "approaching 70" or under is consistent with intellectual disability. See Hall, 572 U.S. 701; Hall v. State, 201 So. 3d 628, 634-35 (Fla. 2016). It is the prevailing clinical standard to afford a five-point standard error of measurement ("SEM") to the tested individual due to the "statistical fact" that imprecision inherently exists in IQ testing, therefore, an IQ score of 75 or below is consistent with a diagnosis of intellectual disability. See id. As the U.S. Supreme Court clarified in Hall, an IQ test's "standard error of measurement 'reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score.'" Moore, 137 S. Ct. at 1049.

Thompson has been administered eleven IQ tests over the years. (2020 PCR 1606). Several of the tests resulted in IQ scores under 80 and some under 75, six scores of which are results of tests administered while in grade school.[23] Beginning at age 5, he received a full-scale IQ of 75 on the

[23] Florida Law recognizes only two tests to be used in consideration of whether someone is intellectually disabled, the Wechsler Adult Intelligence Scale (WAIS) and the Stanford-Binet. Fla. Admin. Code Ann. R. 65G-4.011 (2004). Five of Thompson's scores were obtained on unacceptable testing instruments, including three scores from the school administered Cal. MM: Thompson received a 74 in 1958, a 90 in 1959, and a 79 in 1963. In 1966 and 1968 (7th and 8th grade), he took the Henmon-Nelson test and received scores of 70 and 73.

In 1987 and 1988, Thompson was administered the WAIS-R, resulting in scores of 85 and 82. While the Wechsler Adult Intelligence Scale is an acceptable testing instrument, the early version, the WAIS-R is not based on

Stanford-Binet, and he received a 74 on the same test three years later at age 8. Thompson, 208 So. 3d. at 59.

In 2009, Dr. Sultan administered the WAIS-IV. Because these tests must be normalized or keyed to the current level of human intelligence which rises incrementally over time, and because the accuracy of the tests themselves are improved over time, the most recent WAIS-IV test is the most

"current intelligence theory" and is not supported "by clinical research and factor analytic results" making it a less reliable and valid testing measure than the WAIS-IV. Gordon E. Taub, PhD & Nicholas Benson, PhD, Matters of Consequence: An Empirical Investigation of the WAIS III and WAIS IV and Implications for Addressing the Atkins Intelligence Criterion, Journal of Forensic Psychology Practice, 13:27-48, 32 (2013). The WAIS-IV was the first test developed on these important factors making it the most reliable test available. Specifically, empirical data shows that the WAIS-IV is a more reliable instrument in measuring IQ as well as determining whether someone is intellectually disabled. Id. Therefore, a forensic psychologist should place greater weight on a WAIS-IV score than that of a WAIS-III (or WAIS-R) because the score is "more valid, reliable, and consistent with the publisher's theoretical model to measure intelligence . . ." Id. at 47.

Additionally, the WAIS-R was published in 1981 making it 6 and 7 years old at the time Thompson took the test. This means that Thompson's scores in 1987 and 1988 were compared to the results of the normative sample in 1981. This test date/norm mismatch, called the Flynn Effect, results in the inflation of scores of about "three points per decade." Id. As of 2014 there have been about 4,000 research articles on the Flynn Effect and the increase in IQ scores throughout the population over time. KEVIN S. MCGREW, AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, THE DEATH PENALTY AND INTELLECTUAL DISABILITY, 159 (Edward A. Polloway 2013). As a result, the test instruments have to be revised and re-normed on a regular basis. Taub & Benson, supra. The WAIS-IV Dr. Sultan administered in 2009 was published within a year of Thompson's evaluation.

accurate testing available (T. 98-99).[24] Thompson received a full-scale IQ score of 71 on the WAIS-IV. Sultan opined that considering the confidence interval, his true score is between 68-76. Just sixteen days after Sultan administered the WAIS-IV, Prichard administered a Stanford-Binet, Fifth Edition ("SB-5"), in which he claims Thompson received a full-scale score of 88. Id. at 59; (2009 T1 198).

In 2009, in an attempt to explain the significance of the range of scores in relation to Thompson's adaptive functioning, Thompson sought to introduce the testimony of Stephen Greenspan, Ph.D. Judge Hogan-Scola excluded his testimony:

> Thompson proffered that this evidence could have been used to counteract the seemingly high full-scale IQ score of 88 found by the State's expert, who admittedly never tested Thompson's adaptive functioning nor considered that information because of the bright-line cutoff of 70 announced in Cherry. However, this expert was excluded by the circuit court because he had not personally examined Thompson.

Thompson, 208 So. 3d at 59-60.

This Court expressly identified the refusal to allow Greenspan to testify as a factor in their conclusion that the 2009 hearing did not meet

[24] Each revision of the Wechsler Adult Intelligence Scale improves the testing instrument, thereby providing for more accurate measures of a person's IQ score. Taub & Benson, supra note 22, at 58.

constitutional standards stating

> At his initial intellectual disability hearing, Thompson attempted to introduce the testimony of intelligence testing expert, Dr. Greenspan, in the hope that the expert could more fully explain the range of Thompson's IQ scores in relation to his adaptive functioning, including how significant deficits in adaptive functioning can affect a full-scale IQ score. Thompson proffered that this evidence could have been used to counteract the seemingly high full-scale IQ score of 88 found by the State's expert, who admittedly never tested Thompson's adaptive functioning nor considered that information because of the bright-line cutoff of 70 announced in Cherry. However, this expert was excluded by the circuit court because he had not personally examined Thompson.
>
> Simply put, it is impossible to know the true effect of this Court's holding in Cherry on the circuit court's review of evidence presented at Thompson's intellectual disability hearing, particularly on Thompson's range of IQ scores from 71 to 88[,] [w]hat is clear is that this court instructed the circuit court to conduct Thompson's intellectual disability hearing pursuant to Cherry."

Id. at 60.

Without the proffered analysis from Greenspan, the court was in no position to properly analyze the claim.

> In sum, the United States Supreme Court has made clear that when determining whether an individual meets the criteria to be considered intellectually disabled, the definition that matters most is the one used by mental health professionals in making this determination in all contexts, including those "far

> beyond the confines of the death penalty." Hall v. Florida, 134 S. Ct. at 1993. As such, courts cannot disregard the informed assessments of experts. Id. at 2000.

Hall v. State, 201 So. 3d at 637.

To date, no Florida court has constitutionally analyzed the evidence of the IQ testing administered throughout Thompson's life, despite his timely and repeated efforts to obtain a constitutional review of his claim.

iv. The lower court erred when it relied on the 2009 Order crediting Dr. Prichard's score; the score is invalid due to errors in administration.

As noted supra, in 2009, Dr. Prichard administered the SB-5 to Thompson and obtained an IQ score of 88. If granted an evidentiary hearing, Thompson can credibly establish that Prichard's score is invalid due to errors in the administration of the testing which are known to result in an elevated IQ score.

In anticipation of his hearing on remand, Thompson retained Gale Roid, Ph. D., the author of the SB-5 to review Prichard's 2009 administration of that testing instrument. Dr. Roid has more than 50 years of experience in Assessment Psychology, including the research and development of the SB-5. In his report which was filed with the lower court as required by Rule 3.851(f)(6), Roid discovered several red flags and errors which rendered Prichard's testing invalid and unreliable and resulted in Thompson's IQ score

being artificially inflated by at least 12 points (See 2020 PCR 1609).

Thompson would present testimony that would show the fact that Prichard administered the SB-5 on Thompson within two weeks of Sultan administering IQ testing would also likely artificially inflate Thompson's IQ score. Experts are aware, or should be aware, that best practices caution against administering the same or similar test within a year (2020 PCR 1612); See also THE AAIDD AD HOC COMMITTEE ON TERMINOLOGY AND CLASSIFICATION, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (American Association on Intellectual and Developmental Disabilities, 11th ed. 2010) (1910). Because of the potential practice effect[25] of having taken another similar test a mere two weeks prior, Dr. Roid believes this alone may have inflated Prichard's score by nearly 5 points (2020 PCR 1613).

Additionally, Prichard failed to administer the test in a standardized manner. The SB-5 allows test administrators to begin at a chosen level but instructs them to take into account the test taker's base line functioning. When Prichard tested Thompson in 2009, several psychologists had already testified on the record over the years as to Thompson's brain dysfunction

[25] In his report, Dr. Roid details the similarities between the WAIS IV and the SB-5 intelligence tests and discusses the particular practice effect concerns (2020 PCR 1613).

and memory problems. Prichard had access to various IQ scores Thompson obtained, several of which were in the low 70's. And, Prichard was provided school records which clearly establish concerns about Thompson's intellectual abilities. Based on this information, Dr. Roid would unequivocally state that Prichard should have started the test and each subtest at lower levels than he chose and doing so contravened the standardized instructions for administering the SB-5. This error likely artificially inflated Thompson's overall SB-5 IQ score by approximately five points independent of the five-point inflation from the practice effect (2020 PCR 1612).

Moreover, Prichard's report noted little about the testing itself, a practice that Dr. Roid also identified as substandard:

> Dr. Prichard also discussed very little about the testing session in his final report, instead reviewing much of the background information and describing the test scores rather than stating the reasons for considering the testing session to be valid. It is professional and best practice to complete the behavioral section of the record form with confirmation of a valid testing session. In contrast, Dr. Sultan completed the test-session behavior of Mr. Thompson in a very thorough way after administering the WAIS-IV in 2009. Any test administration can be strongly affected by the cooperation, mood, health, vision, and other factors in the examinee's life at the time of testing.

(2020 PCR 1617).

By ignoring the mandate and denying Thompson the right to present

this evidence at an evidentiary hearing, the lower court has created an unacceptable risk that the State of Florida may execute a man categorically exempt from execution and calls into doubt the legitimacy of Florida's death penalty system.

III. Applying this Court's ruling in *Philips v. State* to Thompson will result in a death penalty system that violates the Eighth Amendment prohibition against arbitrary imposition of the death penalty and equal protection of the laws.

Thompson raised this issue in his Response to the State's Motion, but the lower court did not address this issue. To the extent that this Court would find that Okafor is not controlling, which Thompson does not concede is the case, Thompson urges this Court to remand to the lower court for a merits ruling on this argument.

To deny Thompson the right to an evidentiary hearing where a court would apply the standards set out in Hall, while other similarly situated capital defendants have been granted Hall relief, would violate Thompson's Fifth, Eighth and Fourteenth Amendment rights to equal protection of the laws, substantive and procedural Due Process, and the right to be free from the arbitrary imposition of the death penalty. "[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 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. See e.g. Herring v. State, SC15-1562, 2017 WL 1192999 (Fla. March 31, 2017) (Finding that under Hall, Herring had previously established each element of the test of intellectual disability, vacating the death sentence, and reducing his sentence to life); State of Florida v. Roger Cherry, No. 1986-CF-04473 (Fla. 6th Cir. Ct. May 18, 2017) (Doc. No. 918); Hall v. State, 201 So. 3d 628, 638 (Fla. 2016) (Vacating sentence of death with instructions to enter a life sentence based on Hall v. Florida); and State of Florida v. Sonny Boy Oats, Jr., No. 1980-CF-016 (Fla. 5th Cir. Ct. April 1, 2021) (Doc. No. 267, Order Vacating Defendant's Death Sentence).

The lower court denying Thompson the opportunity to present

evidence, unlike others who were in a similarly situated posture, has violated his right to equal protection under the Fourteenth Amendment of the United States Constitution. Indeed, others who may have lost their claims were still given the opportunity to make a full presentation of the evidence in support of their claim.[26] Those defendants known to Thompson who were given the opportunity to make a full presentation to the circuit court based on Hall and/or Walls include: Joe Nixon, Leon County Case No. 1984-CF-02324; Leonardo Franqui, Miami-Dade County Case No. 1992-CF-06089 (on mandate from this Court remanding for evidentiary hearing); Jerry Haliburton, Palm Beach County Case No. 1982-CF-001893 (same); Tavares Wright, Polk County 2000-CF-2727 (same); and Dean Kilgore, Polk County Case No. 1989-CF-686-A-0 (Mr. Kilgore died on death row on January 12, 2018 while pending evidentiary hearing by order of a mandate from this Court). Franqui was remanded for further evidentiary development after Thompson.

Moreover, both the Eighth and Fourteenth Amendments preclude

[26] In Smith v. Comm'r, Ala. Dep't of Corr., the Eleventh Circuit Court of Appeals acknowledged that a rule announced by the Supreme Court of the United States should still be given equal effect even where the rule "only guarantees the chance to present evidence in support of relief sought, not ultimate relief itself." 924 F.3d 1330, 1339, n.5 (2019), (citing Montgomery v. Louisiana, 136 S. Ct. 719 (2016)).

states that retain capital punishment from making arbitrary eligibility determinations. See Gregg, 428 U.S. at 188; see also Godfrey, 446 U.S. at 428; Yick Wo v. Hopkins, 118 U.S. 356 (1886); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942)). There is no non-arbitrary, rational basis that justifies this Court ordering Thompson – but not other similarly-situated defendants – be denied the benefit of Hall. Factors such as a busy court calendar, busy expert witness calendars, a global health pandemic, and the thorough presentation of related issues through motion practice and hearings, should not determine whether a capital defendant lives or dies. There is no meaningful difference between Thompson's case and those cases in which a capital defendant was able to press his claim under Hall at an evidentiary hearing, some of whom successfully obtained a life sentence. The death penalty "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" Johnson v. Mississippi, 486 U.S. 578, 584–85 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 884–885, 887 n.24 (1983)).

Likewise, this Court cannot treat Thompson's case differently than Okafor, Jackson, and the line of cases pending resentencing due to Hurst v. State, from which this Court has now receded in Poole v. State. The principles of finality concerning duly-issued mandates and grants of

postconviction relief do not differ between Hurst and Hall cases, both of which concern the reliability of Florida's capital sentencing scheme. A death sentence that fails to meet constitutional requirements is invalid, regardless of whether it is a Sixth or Eighth Amendment violation. Handling post-Poole cases in the wake of Okafor differently than those in a post-Phillips world, would be a prime example of arbitrary and capricious.

To allow the lower court to act outside of established law and disregard a duly-issued mandate in this situation and deny Thompson the benefit of Hall would violate his right to equal protection of the law under the Fourteenth Amendment to the United States Constitution. See Yick Wo, 118 U.S. 356; Skinner, 316 U.S. 535. The unevenness that would flow from applying Phillips to Thompson would flout the fundamental fairness interests enshrined in the Fourteenth Amendment's concept of Due Process. See Carmell v. Texas, 529 U.S. 513, 533 (2000) (holding "there 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.").

IV. The change in law following Phillips v. State amounts to an ex post facto change in the law.

Mr. Thompson argued to the court below that to apply Phillips to

Thompson would amount to an unconstitutional ex post facto application of the law. The court did not address this argument. To the extent that this Court would find that Okafor is not controlling, which Thompson does not concede is the case, Thompson urges this Court to remand to the lower court for a merits ruling on this issue.

Article I, § 10 of the federal Constitution prohibits state ex post facto laws. See e.g., Weaver v. Graham, 450 U.S. 24 (1981); Lindsey v. Washington, 301 U.S. 397 (1937). Federal Due Process erects the same prohibition against state judicial action. Bouie v. City of Columbia, 378 U.S. 347 (1964):

> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." Id. at 353-354. See also Marks v. United States, 430 U.S. 188 (1977).

Bouie notes the thematic connection between the prohibition of ex post facto liability and the doctrine of vagueness, citing Paul A. Freund, The Supreme Court and Civil Liberties, 4 VAND. L. REV. 533, 541 (1951), and Anthony G. Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. PA. L. REV. 67, 73-74, n. 34 (1960). See State v. Ramseur, 834 S.E. 2d

106 (N.C. 2020). It is true that one of the traditional concerns of both the Ex Post Facto Clause and the void-for-vagueness precept – the danger of punishing an individual for acts which s/he had no notice would be criminal – is inapplicable here. But that is not the only concern of either doctrine. Both also stand to protect against malleable legal rules which "inject[ ] into the governmental wheel so much free play that in the practical course of its operation it is likely to function erratically – responsive to whim or discrimination . . . ." Amsterdam, supra, at 90. 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 (1798) (opinion of Justice Chase). 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).

In Calder, "Justice Chase explained that the reason the Ex Post Facto Clauses were included in the Constitution was to assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legislation." Miller v. Florida, 482 U.S. 423, 429 (1987). No lesser restraint is imposed upon state judicial action by the ex post facto component of federal

Due Process.

V. In Phillips, this Court erred in holding that Hall announced a new non-watershed rule of Federal Eighth Amendment law for purposes of Teague v. Lane and Witt *v. State*

Mr. Thompson raised this issue in his Response to the State's Motion, but the lower court did not address this issue. To the extent that this Court would find that Okafor is not controlling, which Thompson does not concede is the case, Thompson urges this Court to remand to the lower court for a merits ruling on this argument.

This Court's holding in Phillips - that Hall announced a new non-watershed rule of federal Eighth Amendment law for purposes of Teague v. Lane, 498 U.S. 288 (1989) and Witt v. State, 387 So. 3d 982 (Fla. 1980) - was error and violates both Witt and Teague. As this Court has stated:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.

Witt v. State, 387 So. 2d 922, 925 (Fla. 1980) (internal quotations and

citations omitted). But this is precisely what has been done by the holding in Phillips that Hall announced a new, non-watershed rule of law for Eighth Amendment purposes. The holding in Phillips raises a grave risk that Florida will execute intellectually disabled capital defendants. The determination that Hall announced a new non-watershed rule was error. See Bousley v. United States, 523 U.S. 614, 620 (1998); Montgomery v. Louisiana, 136 S. Ct. 719 (2016) ; Chaidez v. United States, 568 U.S. 342, 348 (2013).

VI. Phillips v. State is predicated upon an erroneous understanding of the decision in Hall v. Florida.

Mr. Thompson presented this argument below, however, the court did not address this argument. To the extent that this Court would find that Okafor is not controlling, which Thompson does not concede is the case, Thompson urges this Court to remand to the lower court for a merits ruling on this argument.

Thompson was initially denied the relief to which he was entitled under Atkins v. Virginia, because the lower court followed the unconstitutional interpretation on Florida's intellectual disability statute established in Cherry. Thompson, 41 So. 3d 219, *1 (Fla. 2010) ("[W]e hold that there is competent, substantial evidence to support the circuit court's factual findings that Thompson is not mentally retarded, based on this Court's definition of the term as set forth in Cherry."); See also Hall v. State, 109 So. 3d 704, 708

(Fla. 2012) ("In Cherry . . . *we determined the proper interpretation of section 921.137*." (emphasis added)).

The Supreme Courts' effective overruling of Cherry did not hold Florida's intellectual disability statute itself unconstitutional, it merely held that Cherry's glossing of the statute was federally impermissible. In consequence, this Court, and lower courts, must now apply the statute without the Cherry gloss. Decisions explicating statutes favorably to criminal defendants are – and as a matter of federal constitutional due process and equal protection must be – applied retroactively. See Bousley, supra, at 620-621; Schriro v. Summerlin, 542 U.S. 348, 351 (2004) (distinguishing "decisions that narrow the scope of a criminal statute by interpreting its terms" from "constitutional determinations"). Ignoring this point, the Phillips decision of May 21, 2020 confuses statutory interpretation with constitutional innovation.

CONCLUSION

The lower court erred when it disregarded this Court's duly-issued mandate commanding the lower court to hold an evidentiary hearing on Mr. Thompson's Rule 3.851 motion raising intellectual disability as a bar to execution and denied his motion. This Court's duly-issued mandate is a final judgment and cannot be withdrawn or revoked. Neither this court nor the

lower court can disregard the mandate and deny Thompson the full and fair hearing that this Court previously Ordered.

Wherefore, Mr. Thompson respectfully asks this Court vacate the lower court's ruling and remand his case for an evidentiary hearing that complies with this Court's prior mandate, during which, he can fully present evidence establishing his intellectual disability. To deny him such a hearing would violate his Fifth, Sixth, Eighth and Fourteenth Amendment rights and stand in violation of clearly established law prohibiting a lower court from ignoring this Court's mandate. State v. Okafor, 306 So. 3d 930 (Fla. 2020).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Second Amended Initial Brief has been served using the Florida Courts e-filing portal upon Jennifer Davis, Assistant Attorney General on this 5th day of May, 2021.

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CERTIFICATE OF COMPLIANCE FOR COMPUTER-GENERATED BRIEFS

Counsel certifies that this brief comports with the requirements of Florida Rules of Appellate Procedure 9.210 in content and organization and that the Brief is typed in Arial 14-point font as required by In re: Amendment to Florida Rules of Appellate Procedure 9.120 and 9.210, 308 So. 3d 53 (Fla. 2020) (Mem). Counsel timely filed Thompson's Initial Brief on April 26, 2021 using the alternate font allowed by the rule, Bookman Old 14-point; however, as this Court has acknowledged, the font is much larger than the previously accepted Times New Roman, and Thompson's brief exceeded the Court Ordered page limit of 75. Recognizing that the new font options take up more space on the page, this Court replaced page limits with word counts.

However, capital defendants on appeal of an order summarily denying their Rule 3.851 motion are the only group of litigants excluded from the benefit of this change. Had he used Times New Roman font, Thompson's brief would only be 69 pages. Indeed, even using Arial, the smaller of the two new font options, Thompson still loses nearly five pages to present and preserve his arguments.

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