No. 22-5906

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM LEE THOMPSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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

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Capital Case

QUESTIONS PRESENTED

1. Whether the Florida Supreme Court correctly determined this Court's holding in Hall v. Florida, 572 U.S. 701 (2014), announced a new rule of constitutional law that did not apply retroactively because new rules of constitutional law that constitute a clear break with the past do not apply retroactively to Thompson whose judgment and sentence became final in 1993?

2. In promoting finality and efficiency of the judicial process, does the law of the case doctrine violate the Eighth and Fourteenth Amendments by not giving retroactive effect of Hall v. Florida, 572 U.S. 701 (2014) to Thompson whose crime was committed in 1976 and whose judgment and sentence were final in 1993?

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The decision of the Florida Supreme Court (Pet. App. B) is reported at Thompson v. State, 341 So. 3d 303 (Fla. 2022). The Eleventh Judicial Circuit Trial Court order is unpublished, but provided at Pet. App. A.

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered March 31, 2022. A motion for rehearing was denied on June 23, 2022. Thompson adduces that this Court's certiorari jurisdiction is based on 28 U.S.C § 1257(a). Respondent acknowledges that § 1257 sets out the scope of this Court's certiorari jurisdiction but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Amend. VIII, U.S. Const.

The Fourteenth Amendment to the United States Constitution states in pertinent part: "[N]or shall any State deprive to any person within its jurisdiction the equal protection of the laws." Amend. XIV, U.S. Const., § 1.

STATEMENT OF THE CASE

Petitioner, William Lee Thompson, is a Florida prisoner under sentence of death after being convicted in the circuit court in and for Miami-Dade County, Florida, for first-degree murder, kidnapping, and involuntary sexual battery of Sally

Ivester. Thompson v. State, 619 So. 2d 261, 262 (Fla. 1993). On March 30, 1976, Thompson and his co-defendant, Rocco James Surace, beat and tortured victim Ivester, with a chain, a club, and a chair leg; ramming a chair leg and a night stick into her vagina causing internal bleeding, burning her with lit cigarettes and lighters, and forcing her to eat her sanitary napkin, and lick beer off the floor. Ivester died from her injuries.

Direct Appeal of Initial Conviction - 1977

Thompson pled guilty to the charges of first-degree murder, kidnapping, and involuntary sexual battery, and was sentenced to death, and concurrent sentences of life imprisonment. Thompson v. State, 351 So. 2d 701 (Fla. 1977). On direct appeal, the Florida Supreme Court reversed and remanded with instructions to withdraw the guilty pleas and proceed to trial, finding Thompson was prejudiced by an honest misunderstanding which contaminated the voluntariness of his plea. Id. On remand, Thompson entered a second guilty plea and was again convicted and sentenced to death. Thompson v. State, 389 So. 2d 197, 199 (Fla. 1980). Petition for writ of certiorari to the Supreme Court of Florida was denied by this Court on April 24, 1978. Thompson v. Florida, 435 U.S. 998 (1978).

Direct Appeal After Resentencing – 1980

On direct appeal after Thompson's resentencing, he argued his death sentence should be reversed because it was an error to deny his motion for additional psychological testing. Thompson, 389 So. 2d at 199. Thompson was arrested on April 1, 1976 and examined by two psychiatrists in April and by two other psychiatrists in

June of 1976. Thompson, 389 So. 2d at 199. All four psychiatrists concluded that he [Thompson] was competent to stand trial and knew right from wrong at the time of the offense and had the capacity to aid counsel. Id. The Florida Supreme Court found the trial court properly inquired into the competency of Thompson, considering the four previous psychiatric reports, and the failure of counsel to identify any particular circumstance that had caused the mental condition of Thompson to change since those prior examinations and the guilty plea. Id. The court affirmed Thompson's conviction and sentence.

Initial 3.850 Post-conviction Motion - 1982

Collateral relief was denied by the post-conviction court when Thompson filed a motion pursuant to Fla. R. Crim. P. 3.850 to vacate his judgment and sentence of death, claiming his co-defendant, Surace, forced him to take the blame, contrary to his testimony at his co-defendant's trial. Thompson v. State, 410 So. 2d 500 (Fla. 1982). On appeal, the Florida Supreme Court affirmed, finding that the trial court properly denied relief because Thompson's statement recanting his sworn in-court testimony was insufficient to justify an evidentiary hearing on the petition for collateral relief. Id. Thompson then filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida, and after an evidentiary hearing, the court found all of Thompson's claims were without merit and denied relief. Thompson v. Wainwright, 787 F.2d 1447, 1449 (11th Cir. 1986).

After the denial of relief, Thompson appealed to the United States Court of Appeals, Eleventh Circuit claiming ineffective assistance of counsel for failing to

investigate and present mitigating evidence. However, Thompson's attorney testified that the plan at the penalty phase hearing was to elicit certain mitigating circumstances through cross-examination, call Thompson, who would express his remorse, and in closing, plead to the jury for mercy. Thompson v. Wainwright, 787 F.2d at 1452. Thompson refused to testify during the penalty phase of his trial but two days later testified in his co-defendant's trial, taking the majority of blame for the torture-murder himself. Id. The United States Court of Appeals, Eleventh Circuit affirmed the denial of the writ of habeas corpus, finding that "[Thompson] was not entitled to relief as the jury still would have concluded that the balance of aggravating and mitigating circumstances warranted death." Id. at 1447

Second 3.850 Post-conviction Motion - 1987

Thompson filed his second rule 3.850 post-conviction motion claiming failure of the sentencing judge to allow jury consideration of non-statutory mitigating circumstances in the penalty phase. Thompson v. Dugger, 515 So. 2d 173, 174 (Fla. 1987). The Florida Supreme Court reversed and remanded for new sentencing, finding instructional error under Hitchcock v. Dugger, 481 U.S. 393 (1987).

Judgment and Sentence Became Final - 1993

Upon resentencing, Thompson was sentenced to death again. Thompson v. State, 619 So. 2d 261 (Fla. 1993). On appeal, Thompson raised claims that included trial court error for permitting prior testimony of an unavailable witness to be read to the jury; failing to grant Petitioner's motion to strike the jury panel; allowing the introduction of Petitioner's prior inconsistent testimony; allowing photographs

depicting the victim's post-trauma dissection; limiting the testimony of defense witnesses; and in sentencing him to death. Id. at 264–65. The Florida Supreme Court affirmed the trial court's denial of relief. Id. at 263. Thompson's judgment and sentence were final in 1993. Petition for writ of certiorari was denied by this Court on November 8, 1993. Thompson v. Florida, 510 U.S. 966 (1993).

Third 3.850 Post-conviction Motion - 1995

In 1995, Petitioner filed a third post-conviction 3.850 motion that was summarily denied by the post-conviction court. Thompson v. State, 759 So. 2d 650, 655 (Fla. 2000). Thompson appealed the denial of post-conviction relief and filed a petition for writ of habeas corpus in the Florida Supreme Court. Id. While the appeal and habeas petition were pending in the Florida Supreme Court, jurisdiction was relinquished by a motion filed by the State, for the purpose of holding a Huff[1] hearing. After holding the Huff hearing, the trial court again summarily denied Thompson's claims. Id.

The Florida Supreme Court began the analysis of Thompson's claims by summarily disposing of the issues that were procedurally barred and that had already been raised and considered by the court. Thompson, 759 So. 2d at 657. The Florida Supreme Court affirmed the trial court's order denying post-conviction relief and denied the petition for habeas corpus. Id. at 668.

Federal Habeas Corpus Petition – 2001

On June 13, 2001, Thompson filed a federal habeas corpus petition in the

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

district court that included both exhausted and unexhausted claims. Thompson v. Sec'y for Dept. of Corr., 320 F.3d 1228 (11th Cir. 2003). The district court dismissed the petition because it was a mixed petition and Thompson appealed the dismissal to the United States Court of Appeals for the Eleventh Circuit Court, which affirmed the dismissal. Id.

Fla. R. Crim P. 3.851 and 3.203 Post-conviction Motion - 2007

After the United States Supreme Court rendered its decision in Atkins v. Virginia, 536 U.S. 304 (2002), Thompson filed his fourth post-conviction motion to vacate his death sentence pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203, on the grounds that he is intellectually disabled and exempt from execution. Thompson v. State, 41 So. 3d 219 (Fla. 2010). The post-conviction court denied the motion and determined that the claim was procedurally barred because the issue of intellectual disability was raised as mitigation and litigated in Thompson's 1989 resentencing proceeding. Thompson v. State, 208 So. 3d 49, 54 (Fla. 2016). On appeal, on July 9, 2007, the Florida Supreme Court reversed and remanded concluding the determination was in error and Thompson would be allowed to plead and prove the elements necessary to establish an intellectual disability and any motion filed in conformance with this order shall be filed in the Circuit Court within thirty (30) days. Thompson, 208 So. 3d at 54.

Fla. R. Crim P. 3.851 and 3.203 Post-conviction Motion - 2007

Thompson filed his fifth post-conviction motion On August 8, 2007, pursuant to this Court's July 2007 order and again raised the claim that Atkins, Florida Statute

§ 921.137, and Florida Rule of Criminal Procedure 3.203, prohibit his execution because he is intellectually disabled. Id. at 54. The trial court again denied Thompson's motion that he was intellectually disabled noting he failed to allege the elements of an intellectual disability. Id. On appeal, the Florida Supreme Court remanded again for an evidentiary hearing, and instructed the post-conviction court, to specifically include the threshold requirements set forth in Cherry v. State, 959 So. 2d 702, the prevailing law at the time of the court's decision.[2] Id. at 55. The court noted that Thompson must establish that he has:

> significantly subaverage general intellectual functioning. If significantly subaverage general intellectual functioning is established, [Thompson] 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." Thompson v. State, 3 So. 3d 1237, 1238 (Fla. 2009).

The definition of an intellectual disability as established by Atkins was the same then as it is now, and Thompson had to establish by clear and convincing evidence that he met all three domains, regardless of what method the court used to make the determination.

Evidentiary Hearing for Intellectual Disability Determination - 2009

An evidentiary hearing was held on April 13, 2009, and April 27, 2009. Thompson, 208 So. 3d at 55. Thompson called William Weaver, his eighth-grade teacher who testified that Thompson was the most academically challenged student

[2] Cherry was the prevailing law at the time of the court's decision and Hall v. Florida, 572 U.S. 701(2014) had not yet been decided.

he had, and reviewed school IQ scores ranging from 70 to 79. Id. Dr. Faye Sultan, a psychologist, testified that she administered Thompson the WAIS-IV IQ test on March 9, 2009, and calculated his full range IQ score as 71. Id. at 56. Dr. Sultan concluded that Thompson had adaptive deficits that manifested before age 18, and ultimately concluded that Thompson was intellectually disabled. Id.

Finally, Thompson called Dr. Stephen Greenspan, an expert witness qualified in intellectual disabilities and psychology. Id. Dr. Greenspan advised the court that he never evaluated Thompson and thus could not diagnose him as intellectually disabled, so the post-conviction court precluded him from testifying. Thompson, 208 So. 3d at 56. The trial court did, however, permit Thompson's counsel to proffer the intended content of Dr. Greenspan's testimony. Id.

The state called Dr. Greg Prichard who was qualified as an expert in forensic psychology. Id. Dr. Prichard administered the Stanford-Binet IQ test rather than the WAIS-IV due to the concern for the "practice effect."[3] Thompson, 208 So. 3d at 56. Dr. Prichard explained that "the Stanford-Binet 5 and the WAIS-IV measure the same underlying attribute IQ, but go about it in different ways, thus negating the practice effect." Thompson, 208 So. 3d at 56. Dr. Prichard noted that Thompson's IQ score was consistent with earlier IQ scores of 85 in 1987 and 82 in 1988. Id. After a review of Thompson's records and his interactions with him, Dr. Prichard opined that Thompson was not intellectually disabled. Id. Dr. Prichard noted that Thompson's

[3] The practice effect causes an individual's IQ scores to rise if that individual was administered the same IQ test within one year.

ability to enlist in the Marines, obtain his GED, work as a security guard, cook, roofer, and truck driver is inconsistent with an intellectual disability. Id.

The post-conviction court denied Thompson relief, concluding that he failed to prove by clear and convincing evidence that he is intellectually disabled. Thompson, 208 So. 3d at 57. The Florida Supreme 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 [does not have an intellectual disability], based on this [c]ourt's definition of the term as set forth in *Cherry*." Thompson v. State, 41 So. 3d 219 (Fla. 2010).

Sixth Post-conviction Motion - 2012

Thompson's next post-conviction motion challenged counsel's effectiveness under Strickland[4] and was based on Porter v. McCollum, 558 U.S. 30 (2009). The post-conviction court denied relief, and the denial of relief was affirmed on appeal. Thompson v. State, 94 So. 3d 499 (Fla. 2012).

Seventh Post-conviction Motion - 2015

On May 26, 2015, Thompson filed his next successive motion for post-conviction relief, raising one issue: that his death sentence violated the Eighth and Fourteenth Amendments pursuant to Atkins v. Virginia, 536 U.S. 304 (2002) and Hall v. Florida, 572 U.S. 701 (2014). Thompson, 208 So. 3d at 57. After denial of relief by the post-conviction court, the Florida Supreme Court reversed and remanded for

[4] Strickland v. Washington, 466 U.S. 668 (1984).

a new evidentiary hearing consistent with this Court's ruling in Hall. Id. at 59. Thompson's judgment and sentence from 1993 was never vacated.

After this Court's ruling in Hurst v. Florida, 577 U.S. 92 (2016), Thompson filed a post-conviction motion in January 2017 pursuant to Florida Rule of Criminal Procedure 3.851, requesting relief. Thompson, 261 So.3d 1255 (Fla. 2019). After denial of relief by the post-conviction court, Thompson appealed, and the Florida Supreme Court determined Thompson was not entitled to retroactive relief. Id.

On May 21, 2020, the Florida Supreme Court receded from its opinion in Walls v. State, 213 So. 3d 340 (Fla. 2016) that gave retroactive effect to this Court's ruling in Hall. Phillips v. State, 299 So. 3d 1013 (Fla. 2020), cert. denied, 141 S. Ct. 2676 (2021). At the time, Thompson's second evidentiary hearing on intellectual disability that was ordered in 2016 remained pending before the post-conviction court. On June 19, 2020, the state filed a motion for reconsideration and request to deny Thompson's seventh post-conviction motion for relief, citing the intervening change in law in Phillips and that conducting such a hearing runs contrary to current law, judicial economy, and the promotion of finality. (Pet. App. F A-47). Thompson's seventh post-conviction motion was denied, and the Florida Supreme Court affirmed the denial, ruling the law-of-the-case doctrine's exception for intervening change of controlling law applied and the United States Supreme Court's decision in Hall, did not apply retroactively to Thompson's case. Thompson v. State, 341 So. 3d 303 (Fla. 2022), reh'g denied, 341 So. 3d 307 (Fla. 2022).

Thompson now seeks certiorari review of the Florida Supreme Court decision, forty-six years after his crimes, and twenty-nine years after his judgment and sentence became final.

REASONS FOR DENYING THE WRIT

Petitioner is not intellectually disabled, and the decision of the Florida Supreme Court does not conflict with this Court's decisions in Atkins v. Virginia or Hall v. Florida and presents no important or unsettled question of constitutional law that would merit certiorari review.

Thompson committed his crimes in 1976 and his judgment and sentence became final in 1993. This Court's holding in Atkins is settled law and creates no important or unsettled question of constitutional law for review. Thompson's argument that Atkins is a rule of general application that can be applied to his set of facts must fail for many reasons. (Pet. 21). First, Atkins held that the Eighth Amendment categorically prohibits executing intellectually disabled defendants, but this Court declined to define how courts must determine intellectual disability. Atkins, 536 U.S. 304. Atkins does not apply to Thompson because he is not intellectually disabled.

This Court in Hall, subsequently held that Florida's rule, as interpreted by that State's Supreme Court, foreclosing further exploration of a capital defendant's intellectual disability if his IQ score was more than 70, created unacceptable risk that persons with intellectual disability would be executed, in violation of Eighth Amendment, abrogating, Cherry v. State, 959 So. 2d 702 (Fla. 2007). Hall v. Florida, 572 U.S. 701 (2014). Thompson was afforded a full evidentiary hearing in 2009 to provide clear and convincing evidence that he was intellectually disabled. It is true

that the evidentiary hearing was judged by the standard set forth in Cherry, however, the facts of the case have not changed, and Thompson had to present evidence in all three domains. This Court noted that the then-existing statutory definitions of intellectual disability "generally conform with the clinical definition." That is, 1) significantly subaverage intelligence; 2) deficits in adaptive functioning; and 3) onset during the developmental period. Atkins, 536 U.S. at 318. The statutory definition of an intellectual disability has remained the same throughout Thompson's appeals.

To the extent Thompson is challenging Florida's refusal to apply Hall retroactively, the State observes that this Court has denied certiorari in cases directly challenging the Florida Supreme Court's retroactivity decision in Phillips. See Phillips v. State, 299 So. 3d 1013 (Fla. 2020) (No. 20-6887), cert. denied, 141 S. Ct. 2676 (2021) and Nixon v. State, 327 So. 3d 780, 781 (Fla. 2021) (No. 21-1173), cert. denied sub nom., Nixon v. Florida, 142 S. Ct. 2836 (2022). Thompson misapprehends the understanding of Atkins and Hall as it relates to his case by making it akin to Chaidez v. United States, 568 U.S. 342 (2013). Chaidez involved a new procedural rule of law that required counsel to inform their clients about deportation if they plead guilty. Chaidez reiterated the retroactivity rule for new rules of criminal procedure stating: "[u]nder *Teague,* a person whose conviction is already final may not benefit from a new rule of criminal procedure on collateral review. Id. at 347. A "case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S at 301, Id. at 347. A result is not so dictated unless it would have been

"apparent to all reasonable jurists." A new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Mackey v. United States, 401 U.S.667, 692 (1971). The Court illustrated the retroactivity standard balancing test articulated in Linkletter v. Walker, 381 U.S. 618 (1965), that "new rules that constituted clear breaks with the past generally were not given retroactive effect, including on federal collateral review." Edwards v. Vannoy, 141 S. Ct. 1547, 1554 (2020) (citing Teague v. Lane, 489 U.S. at 304).

Thompson's position that Hall is not a new rule of criminal procedure must fail because Hall, did not place certain conduct, i.e., sentencing Thompson to death, beyond the power of the state to proscribe. Hall is a clear break from past precedent in that Florida courts cannot use a bright line cut off for IQ scores when determining if an individual is intellectually disabled and is a procedural rule that is not retroactive.

As the Eleventh Circuit has explained, "[f]or the first time in *Hall*, the Supreme Court imposed a new obligation on the states not dictated by *Atkins* because *Hall* restricted the states' previously recognized power to set procedures governing the execution of the intellectually disabled." In re John Ruthell Henry, 757 F.3d 1151, 1158–59 (2014); see also Goodwin v. Steele, 814 F.3d 901, 904 (2014) (Hall mandates "*new* procedures for ensuring that States do not execute members of an already protected group" (emphasis added)); Phillips, 299 So. 3d at 1019 ("[I]t remains clear

that Hall establishes a *new* rule of law that emanates from the United States Supreme Court and is constitutional in nature . . . ." (emphasis added)).

Indeed, the Court pointed out in Hall that while its precedents were instructive, "the inquiry must go further." 572 U.S. at 721. And "[n]othing in Atkins dictated or compelled the Supreme Court in Hall to limit the states' previously recognized power to set an IQ score of 70 as a hard cutoff." Henry, 757 F.3d at 1159. Justice Alito's dissent (joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas) also shows that Hall announced a new rule. See Beard v. Banks, 542 U.S. 406, 414 (2004) (a result is not dictated by precedent if "reasonable jurists could have differed as to whether [precedent] compelled" the result). In Justice Alito's view, the Court's approach "mark[ed] a new and most unwise turn in [the Court's] Eighth Amendment case law" that "cannot be reconciled with the framework prescribed by our Eighth Amendment cases." Hall, 572 U.S. at 725 (Alito, J., dissenting).

The Florida Supreme Court's decision in Phillips v. State, 299 So. 3d 1013 (Fla. 2020) does not conflict with this Court's decision in Hall. The Florida Supreme Court determined that Hall, is an evolutionary refinement of the procedure necessary to comply with Atkins and "clarified the manner in which courts are to determine whether a capital defendant is intellectually disabled and therefore ineligible for the death penalty." Phillips, 299 So. 3d at 1021. The clear holding in Hall was that "Florida's rule, as interpreted by that State's Supreme Court, foreclosing further exploration of a capital defendant's intellectual disability if his IQ score was more than 70, created unacceptable risk that persons with intellectual disability would be

executed, in violation of Eighth Amendment." Hall, 572 U.S. at 701. The change in procedure required by Hall decided in 2014, was not in existence at the time Appellant's conviction and sentence became final in 1993.

Thompson claims Florida arbitrarily refused to apply Hall to his case. Thompson asserts that he is similarly situated to the defendants in Haliburton v. State, 163 So. 3d 509 (Fla. 2016); Franqui v. State, 211 So. 3d 1026 (2017); Nixon v. State, SC15-2309, 2017 WL 462148 (Fla. Feb. 3, 2017); Walls v. State, 213 So. 3d 340 (Fla. 2016) (receded from by Phillips v. State, 299 So. 3d 1013); and Oats v. State, 181 So. 3d 457 (Fla 2015). However, he is not similarly situated to any of those defendants. In Haliburton, and Nixon, the trial court summarily denied their motions to establish an intellectual disability without an evidentiary hearing. In Franqui, the Florida Supreme Court was unsure if the Cherry IQ cutoff scores were dispositive, so they granted a new hearing. In Oats, both the defense and state doctors agreed that he was intellectually disabled because his records were well documented. Walls was also summarily denied without an evidentiary hearing. Thompson's case is not similarly situated because his judgment and sentence were final in 1993 and he was afforded a full evidentiary hearing with the opportunity to prove by clear and convincing evidence that he was intellectually disabled.

Application Of Hall To These Facts Would Not Alter the Outcome

Even if this Court were to consider accepting review, it would find itself in the position of addressing a fact intensive ruling where there is no reasonable argument that the lower court's ruling as to the reliability of the underlying finding was flawed.

A bright line IQ score cut-off was not the reason Thompson lost his intellectual disability claim. The State's expert, Dr. Prichard, explained that "the Stanford-Binet 5 and the WAIS-IV measure the same underlying attribute IQ, but go about it in different ways, thus negating the practice effect." Thompson, 208 So. 3d at 56. Dr. Prichard noted that Thompson's IQ score on the Stanford-Binet he administered, 88, was consistent with earlier IQ scores of 85 in 1987 and 82 in 1988. Id. Thompson's demonstrated and consistent ability to score above 75 on standard tests of intelligence are inconsistent with a finding of intellectual disability.[5] Moreover, at his intellectual disability evidentiary hearing, Dr. Prichard noted that Thompson's ability to enlist in the Marines, obtain his GED, work as a security guard, cook, roofer, and truck driver is inconsistent with an intellectual disability. 208 So. 3d at 56. His testimony was credited by the post-conviction court in affirming the denial of relief under Atkins. (Order of the Honorable Jacqueline Hogan Scola, May 21, 2009, Petitioner's Appendix A38-42).

This Court does not grant certiorari when the asserted error consists of an erroneous factual finding. See Sup. Ct. R. 10. The state court did not unreasonably apply this Court's clearly established precedent and, Thompson never rebutted the state court's factual determinations by clear and convincing evidence. This Court advised in Brumfield v. Cain, 576 U.S. 305, that a factual determination cannot be seen as unreasonable merely because a different conclusion could be reached. This

[5] As the Florida Supreme Court noted, Thompson presented a range of "IQ scores from 71–88." Thompson, 208 So. 3d at 60.

case presents no conflict of law or important unsettled legal question for review. Accordingly, certiorari should be denied.

The law of the case doctrine, exception does not violate the Eighth or Fourteenth Amendments as applied to Petitioner's case whose crime was committed in 1976 and whose judgment and sentence became final in 1993.

Petitioner claims a right to enforce a previous, albeit erroneous, decision from the Florida Supreme Court under the law of the case doctrine. However, a state court's refusal to apply the law of the case doctrine to any particular case hardly presents a compelling issue, much less an issue of constitutional dimension warranting this Court's review.

Hall does not compel an abridgement of the finality of judgments and does not invalidate any statutory means for imposing the death penalty, and an intervening decision by a higher court is one of the exceptional situations that warrants modification of the law of the case doctrine. Thompson's argument that Hall is a mere application of the stated rule in Atkins finds no support in the actual holding in Atkins. Hence, the Florida Supreme Court correctly determined that the post-conviction court did not unreasonably apply Atkins, which held only that the intellectually disabled cannot constitutionally be executed, Atkins,536 U.S. at 307, 321. In reviewing the post-conviction court's determination that Thompson is not intellectually disabled, the Florida Supreme Court examines the record for whether competent, substantial evidence supports the determination of the trial court. Oats v. State, 181 So. 3d 457, 465–66 (Fla. 2015). Thompson is not intellectually disabled, and his sentence and judgment were final long before Hall was decided.

The Florida Supreme Court determined that Walls v. State, 213 So. 3d 340 (Fla. 2016) was erroneously decided and receded from its opinion and noted that the Walls court clearly erred in concluding Hall applied retroactively. Phillips, 299 So. 3d at 1013. The court in Phillips explained it is willing to correct its past mistakes and "*stare decisis* provides stability to the law and to the society governed by that law. Yet *stare decisis* does not command blind allegiance to precedent. "Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court." Phillips, 299 So. 3d at 1023.

Under the law articulated by the Florida Supreme Court in Phillips, Thompson should not be granted another evidentiary hearing. Thompson committed this heinous crime forty-six (46) years ago and now wants the benefit of a change in the law that occurred in 2012, thirty-six (36) years after his crimes. The post-conviction court was correct in denying Thompson relief.

The Florida Supreme Court, the controlling authority, receded from its decision in Walls, and determined that the United States Supreme Court decision in Hall did not warrant retroactive application. Phillips, 299 So. 3d at 1013. Applying Hall to Thompson would result in a manifest injustice because he is asserting a right that does not exist, that Hall should be applied retroactively to him. Applying constitutional rules not in existence at the time a conviction became final undermines the principal of finality and undermines our criminal justice system. Edwards, 141 S. Ct. at 1554. (citing Teague v. Lane, 489 U.S. 288, 304).

The law of the case doctrine is self-imposed by the courts and works to create efficiency, finality, and compliance with the judicial system so that "an appellate decision binds all subsequent proceedings in the same case." United States v. Amedeo, 487 F.3d 823, 829 (2007). The law of the case doctrine is a useful construct, but Thompson fails to cite a case from this Court making it an independently enforceable constitutional right.

Thompson's attempt to reargue the state court retroactivity ruling in Phillips lacks any merit. The argument that Phillips was erroneously decided fails under the Witt v. State, 387 So. 2d 922, 926 (Fla. 1980) analysis employed by the Florida Supreme Court.[6] Thompson has failed to cite any precedent of this Court that states Hall should be given retroactive effect, or that it is a substantive rule. The clear holding in Hall was that "Florida's rule, as interpreted by that State's Supreme Court, foreclosing further exploration of a capital defendant's intellectual disability if his IQ score was more than 70, created unacceptable risk that persons with intellectual disability would be executed, in violation of Eighth Amendment." Hall, 572 U.S. at 701.

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[6] In Asay v. State, 210 So. 3d 1,15-22 (Fla. 2016), cert. denied, Asay v. Florida, 138 S. Ct. 41 (2017), the Florida Supreme Court explicitly stated that despite the federal courts' use of Teague v. Lane, 489 U.S. 288 (1989), to determine retroactivity, "this Court would continue to apply our longstanding Witt analysis, which provides more expansive retroactivity standards than those adopted in Teague." Asay, 210 So. 3d at 15. Witt relies upon this Court's pre-Teague precedent in Stovall v. Denno, 388 U.S. 293 (1967) and Linkletter v. Walker, 381 U.S. 618 (1965). The Florida Supreme Court's state law application of a more stringent standard implicates a matter of state law and does not conflict with this Court's jurisprudence. See Danforth v. Minnesota, 552 U.S. 264 (2008) (states are free to have their own tests for retroactivity).

The decision of the Florida Supreme Court does not merit certiorari review because it does not present an important, unsettled question of federal law.

The primary purpose for certiorari jurisdiction is to resolve conflicts among the United States court of appeals and state courts concerning the meaning of provisions of federal law. Braxton v. United States, 500 U.S. 344, 347 (1991). This Court should deny certiorari review because Thompson has not shown that the Florida Supreme Court's decision conflicts with this Court's or another court's decision on intellectual disability. To the contrary, the decision of the Florida Supreme Court is entirely consistent with this Court's precedent in Hall. To the extent Thompson is attempting to raise the retroactivity of Hall, he cites no directly conflicting authority to the Florida Supreme Court's opinion. Indeed, there is a substantial consensus among state and federal courts holding that Hall is not retroactive. State v. Lotter, 311 Neb. 878, 905, 976 N.W.2d 721, 740 (2022) ("Most state and federal courts to have considered the question have concluded that neither *Hall* nor *Moore I* announced new substantive rules of constitutional law which must be applied retroactively to cases on collateral review.")[7] Therefore, Thompson has not given this Court any compelling reason to grant certiorari review.

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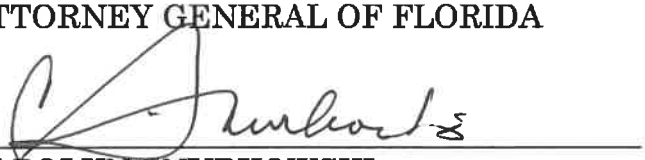
[7]See also In re Henry, 757 F.3d 1151, 1158–59 (11th Cir. 2014); Goodwin v. Steele, 814 F.3d 901, 904 (8th Cir. 2014) (Hall announced a new procedural rule that was not retroactive); Payne v. State, 493 S.W.3d 478, 490–91 (Tenn. 2016) (same); State v. Jackson, 157 N.E.3d 240, 253 (Ohio Ct. App. 2020), appeal not allowed, 2020-Ohio-6835, ¶ 45, 160 Ohio St. 3d 1507, 159 N.E.3d 1153.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA



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