No. 23-

IN THE

Supreme Court of the United States

FRANK A. WALLS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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PETITIONER'S APPENDIX

CAPITAL CASE

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INDEX TO APPENDIX

Supreme Court of Florida

No. SC22-72

FRANK A. WALLS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

February 16, 2023

PER CURIAM.

Frank A. Walls, a prisoner under sentence of death, appeals an order denying his latest successive postconviction motion, which sought relief under *Hall v. Florida*, 572 U.S. 701 (2014).[1] For the reasons given below, we affirm.

Background

Early one morning in 1987, Walls broke into a mobile home then occupied by Edward Alger and Ann Peterson. Using curtain cords, Walls tied them up. Alger managed to get loose, and a

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

struggle ensued. Ultimately, Walls tackled Alger, slashed his throat, and then shot him in the head several times—killing him.

Walls then turned his attention to Peterson, who was at that time helpless and in tears. Though Peterson posed no threat to him, Walls shot her in the head from close range. Peterson began screaming. In response, Walls forced Peterson's face into a pillow and again shot her in the head from close range. She died as a result of these gunshot wounds.

Based on these events, the State charged Walls with two counts of first-degree murder and other crimes. A jury found Walls guilty as charged on both murder counts and recommended a sentence of death for the murder of Peterson. Following the sentencing hearing, the circuit court sentenced Walls to death. On appeal, we reversed his convictions and death sentence, holding that a correctional officer committed a *Massiah*[2] violation during Walls's pretrial detention. *Walls v. State*, 580 So. 2d 131, 132-35 (Fla. 1991) (plurality opinion); *id.* at 135 (Grimes, J., concurring).

2. *Massiah v. United States*, 377 U.S. 201 (1964).

On remand, a jury found Walls guilty of both first-degree murder counts and again recommended a death sentence for the murder of Peterson. Accepting that recommendation, the circuit count imposed the death sentence. This time, we affirmed in all respects. *Walls v. State*, 641 So. 2d 381, 391 (Fla. 1994). Walls then filed a petition for certiorari in the Supreme Court, which was denied. *Walls v. Florida*, 513 U.S. 1130 (1995).

Since then, Walls has challenged his death sentence numerous times, including on the basis that he is intellectually disabled. He first raised an intellectual-disability claim shortly after the Supreme Court decided *Atkins v. Virginia*, which held that the Eighth Amendment forbids execution of the intellectually disabled. 536 U.S. 304, 321 (2002). Following a lengthy evidentiary hearing, the circuit court denied Walls's *Atkins* claim. We affirmed, noting that Walls had never scored 70 or below on an IQ test. *Walls v. State*, 3 So. 3d 1248 (Fla. 2008) (table decision) (citing *Cherry v. State*, 959 So. 2d 702 (Fla. 2007)).

Seven years later, Walls raised his second intellectual-disability claim—this time relying on *Hall v. Florida*. That decision held that *Cherry*'s bright-line test created "an unacceptable risk

that persons with intellectual disability will be executed." *Hall*, 572 U.S. at 704. Reasoning in part that *Hall* did not apply to cases on collateral review, the circuit court summarily denied Walls's claim. We disagreed, determining that *Hall* was retroactive under our state law. *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016) (applying retroactivity test set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980)). In light of that determination, we reversed the summary denial and remanded for an evidentiary hearing. *Id.* at 341, 347.

Over four years later, the evidentiary hearing took place. Ultimately, the circuit court denied Walls's motion, giving two reasons for its ruling. First, relying on intervening case law from this Court, *see Phillips v. State*, 299 So. 3d 1013 (Fla. 2020); *Nixon v. State*, 327 So. 3d 780 (Fla. 2021), the circuit court concluded that *Hall* was not retroactive and, thus, *Hall* could not provide a basis for relief. Second, on the merits, the court found that Walls failed to prove that he was intellectually disabled under section 921.137, Florida Statutes (2021). Walls now appeals.

Analysis

Walls argues that the circuit court erred in multiple respects in denying his intellectual-disability claim. We decline to reach his

merits-based argument and instead affirm on the basis that *Hall* is not retroactive.[3]

Walls's death sentence became final in 1995. Thus, to benefit from *Hall*—a decision that issued almost 20 years later—Walls must show that *Hall* is retroactive. Our decision in *Phillips*, however, forecloses that argument. In that decision, we held that *Hall* is not retroactive under federal or state law, receding from prior case law to the contrary. *Phillips*, 299 So. 3d at 1018-24.

Recognizing the hurdle *Phillips* poses, Walls contends that *Phillips* was wrongly decided. And in the alternative, he argues that our decision in *State v. Okafor*, 306 So. 3d 930, 933-35 (Fla. 2020) (applying finality-of-judgment principles in concluding that we lacked authority to simply reinstate death sentence when time period for recalling our mandate vacating death sentence had expired), and the law-of-the-case doctrine preclude application of *Phillips* in this particular case. But we have already rejected arguments to recede from *Phillips* and have instead consistently applied its holding in the postconviction context, *see, e.g.*,

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3. Our review in this case is de novo. *See Rogers v. State*, 327 So. 3d 784, 787 n.5 (Fla. 2021).

Thompson v. State, 341 So. 3d 303, 304 (Fla. 2022) (death sentence final in 1993); *Pittman v. State*, 337 So. 3d 776, 777 (Fla. 2022) (death sentence final in 1995); *Nixon*, 327 So. 3d at 781 (death sentence final in 1991); *Freeman v. State*, 300 So. 3d 591, 593 (Fla. 2020) (death sentence final in 1991); *Cave v. State*, 299 So. 3d 352, 353 (Fla. 2020) (death sentence final in 1999), even in cases where we had remanded for additional proceedings in light of *Hall*, *see, e.g.*, *Thompson*, 341 So. 3d at 306; *Nixon*, 327 So. 3d at 782.

For instance, in *Nixon*, we affirmed the denial of a *Hall*-based intellectual-disability claim. 327 So. 3d at 784. In so doing, we stated that *Phillips* was the controlling law that governed on appeal, concluding: "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. We further stressed that the law-of-the-case doctrine did not compel a different analysis. *Id.* Again, noting that *Phillips* had issued after our mandate in Nixon's prior appeal, we applied an exception to the law-of-the-case doctrine for intervening changes in controlling law. *Id.*

We reached a similar conclusion in *Thompson*, a case that involved a remand instruction requiring the circuit court to hold a

new evidentiary hearing on Thompson's *Hall*-based intellectual-disability claim. *Thompson*, 341 So. 3d at 305. On remand, the circuit court declined to hold an evidentiary hearing and summarily denied the claim on the authority of *Phillips*. *Id.* Thompson argued on appeal that *Okafor* required the circuit court to hold an evidentiary hearing in compliance with the remand instruction. *Id.* Disagreeing with that argument, we distinguished *Okafor* based on the fact that Thompson's death sentence remained intact. *Id.* at 305-06. Additionally, consistent with *Nixon*, we concluded that *Phillips* constituted an intervening change in law for purposes of an exception to the law-of-the-case doctrine. *Id.* at 306. Accordingly, we followed *Phillips* and held that *Hall* did not apply in Thompson's case. *Id.* Based on this analysis, we affirmed the summary denial of Thompson's intellectual-disability claim. *Id.*

Accordingly, consistent with *Nixon* and *Thompson*,[4] we conclude that Walls does not get the benefit of *Hall*. As a

4. We reject Walls's argument to recede from *Nixon* and *Thompson*.

consequence, his *Hall*-based intellectual-disability claim fails regardless of the evidence presented at his evidentiary hearing.[5]

Conclusion

Based on the above analysis, we affirm the circuit court's ruling.

It is so ordered.

MUÑIZ, C.J., and CANADY, POLSTON, COURIEL, GROSSHANS, and FRANCIS, JJ., concur.
LABARGA, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

LABARGA, J., dissenting.

Because I continue to adhere to my dissent in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020) (receding from *Walls v. State*, 213 So.

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5. Walls also argues that application of *Phillips* would result in a due-process violation, claiming that the decision was both "unexpected and indefensible." We reject this argument. Of significance, federal and state courts alike have concluded that *Hall* is not retroactive. *See State v. Lotter*, 976 N.W.2d 721, 741 (Neb. 2022) (relying on *Phillips* in holding that *Hall* is not retroactive); *State v. Jackson*, 157 N.E.3d 240, 253 (Ohio Ct. App. 2020) (refusing to apply *Hall* retroactively; listing *Phillips* as example of "substantial and growing body of case law" declining "to apply *Hall* and *Moore [v. Texas*, 581 U.S. 1 (2017),] retroactively"); *In re Payne*, 722 Fed. Appx. 534, 538 (6th Cir. 2018) (noting body of federal case law finding *Hall* not retroactive).

3d 340 (Fla. 2016), and holding that *Hall v. Florida*, 572 U.S. 701 (2014), does not apply retroactively), I dissent to the majority's decision affirming the denial of Walls's successive motion for postconviction relief.

An Appeal from the Circuit Court in and for Okaloosa County,
William Francis Stone, Judge
Case No. 461987CF000856XXXAXX

Eric Pinkard, Capital Collateral Regional Counsel, and Julissa R. Fontán, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida; and Kara R. Ottervanger, Office of the Federal Public Defender, Tallahassee, Florida,

for Appellant

Ashley Moody, Attorney General, and Charmaine M. Millsaps, Senior Assistant Attorney General, Tallahassee, Florida,

for Appellee

Supreme Court of Florida

WEDNESDAY, MARCH 29, 2023

Frank A. Walls,
Appellant(s)
v.

State of Florida,
Appellee(s)

SC2022-0072
Lower Tribunal No(s).:
461987CF000856XXXAXX

Appellant's Motion for Rehearing is hereby denied.

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

A True Copy
Test:

SC2022-0072 3/29/2023

John A. Tomasino
Clerk, Supreme Court

SC2022-0072 3/29/2023

KC

Served:

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KARA R. OTTERVANGER
HON. JOHN L. MILLER
NATALIA C. REYNA-PIMIENTO
HON. J. D. PEACOCK
HON. WILLIAM FRANCIS STONE

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR OKALOOSA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. **Case No. 87-CF-856**

Div. 002

FRANK A. WALLS,

Defendant.

ORDER DENYING DEFENDANT'S INTELLECTUAL DISABILITY CLAIM

THIS CAUSE is before this Court pursuant to the Order[1] of the Supreme Court of Florida issued in Walls v. State, 213 So. 3d 340 (Fla. 2016), reversing this Court's summary denial of Defendant's postconviction intellectual disability claim and remanding for this Court to conduct an evidentiary hearing. Having considered Defendant's claim, conducted an evidentiary hearing on the matter, and having considered the record, arguments of the parties, applicable law, and otherwise being fully informed, this Court finds as follows:

LIMITED RELEVANT BACKGROUND

Following a retrial, Defendant was found guilty of the first-degree murder of Edward Alger and Ann Peterson, and the jury unanimously recommended a sentence of death for the

[1] Walls v. State, 213 So. 3d 340 (Fla. 2016).

murder of Ann Peterson.[2] On July 29, 1992, Defendant was sentenced to death for the Peterson murder. The Supreme Court of Florida affirmed the judgment and sentence on July 7, 1994.[3] The United States Supreme Court denied certiorari on January 23, 1995.[4]

Defendant filed an initial motion for postconviction relief, the denial of which was affirmed by the Supreme Court of Florida on February 9, 2006.[5] Although this Court's order was affirmed, the Florida Supreme Court concluded that Defendant was entitled to file a motion for determination of intellectual disability pursuant to rule 3.203.[6] Consequently, in June 2006, Defendant filed a rule 3.203 motion. After holding an evidentiary hearing on the matter, this Court denied relief, and the denial of relief was affirmed.[7] During the time of those proceedings, a strict 70-point IQ test score cutoff applied to claims of intellectual disability.

In 2014, the United States Supreme Court decided Hall v. Florida[8] and held that Florida's strict 70-point IQ test score cutoff was unconstitutional.

In May 2015, based on Hall, Defendant filed a successive postconviction motion to vacate his sentence. After considering the record of the prior evidentiary hearing, this Court found that even if Hall applied retroactively, Defendant would not be entitled to relief, and this Court summarily denied the motion.

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[2] As noted by the Supreme Court of Florida, "Because of the prior trial result, double jeopardy precluded the possibility of a death penalty for the murder of Alger on retrial." Walls v. State, 641 So. 2d 381, 386 n.1 (Fla. 1994).

[3] Walls v. State, 641 So. 2d 381, 391 (Fla. 1994).

[4] Walls v. Florida, 513 U.S. 1130 (1995).

[5] Walls v. State, 926 So. 2d 1156 (Fla. 2006).

[6] Walls v. State, 926 So. 2d 1156, 1181 (Fla. 2006).

[7] Walls v. State, 3 So. 3d 1248 (Fla. 2008) (unpublished table disposition).

[8] Hall v. Florida, 572 U.S. 701 (2014).

In Walls v. State,[9] the Supreme Court of Florida found that Hall applied retroactively, and that Court reversed the summary denial of the intellectual disability claim and remanded the matter for this Court to conduct an evidentiary hearing.

On May 21, 2020, in Phillips v. State,[10] the Supreme Court of Florida receded from its decision in Walls concerning the retroactivity of Hall.

On May 29, 2020, based primarily on Phillips, the State filed a motion for summary denial of Defendant's claim.

On February 8, 2021, this Court concluded that it was bound by the Walls mandate and entered an order denying the State's motion.

On June 29, 2021, the hearing on Defendant's intellectual disability claim commenced in this Court, and it concluded on July 7, 2021.

On August 26, 2021, the Supreme Court of Florida issued Nixon v. State[11] which concerns the nonretroactivity of Hall and the law of the case doctrine.

On September 20, 2021, the parties filed written closing arguments concerning the evidentiary hearing. In a portion of its written closing argument, the State cited Nixon and requested this Court to deny Defendant's intellectual disability claim on nonretroactivity grounds without making any findings concerning the testimony from the hearing.

On September 22, 2021, Defendant filed a "Motion to Strike Defective Written Closing Argument and in the Alternative to be Heard" ("Motion to Strike").

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[9] Walls v. State, 213 So. 3d 340 (Fla. 2016).
[10] Phillips v. State, 299 So. 3d 1013 (Fla. 2020), reh'g denied, SC18-1149, 2020 WL 4727425 (Fla. Aug. 14, 2020), and cert. denied sub nom. Phillips v. Florida, 210 L. Ed. 2d 837 (2021).
[11] Nixon v. State, SC20-48, 2021 WL 3778705 (Fla. Aug. 26, 2021), reh'g denied, SC20-48, 2021 WL 4978675 (Fla. Oct. 27, 2021).

On October 8, 2021, this Court entered an order granting the Motion to Strike in part. That Order permitted Defendant to file a limited brief on the Nixon issue and allowed the State to file a responsive brief on that issue.

On October 13, 2021, based on the above circumstances concerning the Nixon issue, this Court found that it would be unable to comply with the time requirements provided in Florida Rule of Criminal Procedure 3.851(f)(5)(F) concerning rendition of the final order on the intellectual disability claim. Accordingly, this Court entered a status report to the Supreme Court of Florida, with a notice of an enlargement of the time period provided in rule 3.851(f)(5)(F) for this Court to enter the final order on the intellectual disability claim within 30 days after the filing of the final brief concerning the Nixon issue.

On October 22, 2021, Defendant filed its brief.

On October 25, 2021, the State filed its responsive brief.

DEFENDANT'S CLAIM

Defendant argues that he satisfies the legal requirements for intellectual disability. Defendant also argues that Florida law violates federal law and clinical standards to the extent that it would prevent this Court from conforming its decision to professional standards.

LEGAL AUTHORITY

Florida law requires a defendant to prove intellectual disability by clear and convincing evidence.[12] "Clear and convincing evidence means evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief, without hesitation, about the matter in issue."[13]

"The determination of intellectual disability is subject to a three-prong test: (1) significantly subaverage intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen."[14] "[I]f a defendant fails to prove that he or she meets any one of the three prongs of the intellectual disability standard, he or she will not be found to be intellectually disabled."[15]

Significantly Subaverage Intellectual Functioning

Significantly subaverage general intellectual functioning is defined as "performance that is 2 or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Families in rule 65G-4.011 of the Florida Administrative Code."[16] Rule 65G-4.011 provides that the approved tests are the Stanford-Binet Intelligence Scale and Wechsler Intelligence Scale. "The mean IQ test score is 100."[17] "The standard deviation on an IQ test is approximately 15 points, and so two standard deviations is approximately 30 points. Thus a test taker who performs 'two or more standard

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[12] § 921.137(4), Florida Statutes (2021).
[13] Dufour v. State, 69 So. 3d 235, 245 (Fla. 2011), as revised on denial of reh'g (Aug. 25, 2011).
[14] Franqui v. State, 301 So. 3d 152, 154 (Fla. 2020), reh'g denied, SC19-203, 2020 WL 5562317 (Fla. Sept. 17, 2020), and cert. denied sub nom. Franqui v. Florida, 141 S. Ct. 2636 (2021).
[15] Phillips v. State, 299 So. 3d 1013, 1024 (Fla. 2020).
[16] Fla. R. Crim. P. 3.203(b); see also § 921.137(1), Fla. Stat. (2021).
[17] Hall v. Florida, 572 U.S. 701, 711 (2014).

deviations from the mean' will score approximately 30 points below the mean on an IQ test, *i.e.,* a score of approximately 70 points."[18] Accordingly, "the medical approximation of significant subaverage intellectual functioning is an IQ score of 70, plus or minus."[19] "There is a standard error of measurement (SEM) that affects each IQ score, which results in a range approximately 5 points above and below the raw IQ test score."[20]

"[W]hen a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits."[21] "For professionals to diagnose—and for the law then to determine—whether an intellectual disability exists once the SEM applies and the individual's IQ score is 75 or below the inquiry would consider factors indicating whether the person had deficits in adaptive functioning."[22]

Concurrent Deficits in Adaptive Behavior

Adaptive behavior is defined as "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."[23] "The DSM-5 divides adaptive functioning into three broad categories or 'domains': conceptual, social, and practical."[24] "[A]daptive deficits exist when at least one domain is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or

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[18] Hall v. Florida, 572 U.S. 701, 711 (2014).
[19] **Wright v. State, 256 So. 3d 766, 771 (Fla. 2018).**
[20] Id.
[21] Hall v. Florida, 572 U.S. 701, 723 (2014).
[22] Id. at 714.
[23] **Florida Rule of Criminal Procedure 3.203(b); See also § 921.137(1), Fla. Stat. (2021).**
[24] Wright v. State, 256 So. 3d 766, 773 (Fla. 2018). The DSM-5 is the Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association.

in the community."[25] A "person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score."[26]

Age of Onset

Manifestation of the condition before age 18 does not require that the defendant be "diagnosed" before age 18.[27] "Manifestation prior to age eighteen of subaverage intellectual functioning or adaptive deficits that do not rise to the levels required to meet the first two prongs of the intellectual disability standard is irrelevant to a determination of intellectual disability."[28]

DISCUSSION

At the evidentiary hearing, the defense called Dr. Mark Cunningham, Dr. Karen Hagerott, retired Assistant Public Defender James C. Sewell, Jr. (who represented Defendant during his 1992 retrial), Dr. Daniel Martell, Dr. Mark Mills, and Dr. Robert Ouaou. The State called Dr. Gregory Prichard, and the defense called Dr. Barry Crown as a rebuttal witness.

Intellectual Functioning

Defendant fails to prove by clear and convincing evidence that he has significantly subaverage intellectual functioning for the reasons discussed below.

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[25] Id. (quotations omitted).
[26] Hall v. Florida, 572 U.S. 701, 712 (2014) (quoting DSM-5, at 37).
[27] Oats v. State, 181 So. 3d 457, 460 (Fla. 2015).
[28] Haliburton v. State, SC19-1858, 2021 WL 2460806, at *8 (Fla. June 17, 2021).

Dr. Prichard testified that only the Weschler scales and Stanford-Binet measurements are accepted by the Agency of Persons with Disabilities for "measuring that first prong . . . IQ."[29] This testimony is consistent with Florida law.[30]

Dr. Prichard testified that when performing a "retrospective analysis" of intellectual disability, the "best data is typically the data you get from the school records" because "typically we are able to identify intellectually disabled people in the school environment."[31]

At the hearing, this Court heard testimony regarding six IQ scores based on the Weschler scale. Four of the scores were achieved by Defendant between ages 6 and 14, and the remaining two scores were obtained by Defendant as an adult and after his arrest and prosecution in this case.

At age 6, Defendant achieved a full-scale IQ score of 88.[32]

At age 7, Defendant was again tested, and he performed in the average range on the Weschler scale.[33] Dr. Cunningham testified that "average is psychometrically understood as an IQ score from about 90 to 110."[34]

At about age 12, Defendant obtained a full-scale IQ score of 102.[35] In regard to that IQ score, Dr. Hagerott[36] testified that Defendant's "cognitive status was solidly average to

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[29] Evidentiary hearing transcript, page 782. Further references in this Order to the transcript from the evidentiary hearing are designated by "T" followed by the appropriate page number(s).
[30] See Fla. R. Crim. P. 3.203(b); See also § 921.137(1), Fla. Stat. (2021); Haliburton v. State, 46 Fla. L. Weekly S177 *4 n.7 (Fla. June 17, 2021) ("The tests approved by the rules of the Agency for Persons with Disabilities are the Stanford-Binet Intelligence Scale and the Wechsler Intelligence Scale. Fla. Admin. Code R. 65G-4.011.").
[31] T. 779-780.
[32] T. 77, 788.
[33] T. 80, 791. A numerical score was not provided for that test.
[34] T. 80.
[35] T. 82, 792.
[36] Dr. Hagerott testified that she had been retained in 1992 by James Sewell in regard to Defendant's retrial, and she performed neuropsychological testing on Defendant at that time. T. 199-200.

slightly above average."[37] Dr. Hagerott testified that the "data at that point in time is not indicative of an intellectual disability."[38]

At age 14 in 1982, Defendant obtained a full-scale IQ score of 101.[39]

Regarding the IQ scores obtained by Defendant during his childhood, Dr. Cunningham testified that "these scores are inconsistent with what we would generally expect to observe with somebody with intellectual disability."[40] Dr. Prichard noted that concerning IQ measures, "[Y]ou can't score higher than you're capable of scoring."[41]

This Court applies the SEM to the childhood IQ scores and finds that these scores do not support a finding of subaverage intellectual functioning.[42] Moreover, the Court finds that those childhood IQ scores are valid because there is no competent, substantial evidence to show otherwise. Indeed, in Defendant's written closing argument, he admits, "It is true that Mr. Walls had measured IQ scores during his childhood in the average range, *which his defense experts largely assume to be generally correct*."[43]

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[37] T. 210 (emphasis added).
[38] T. 247.
[39] T. 83, 794.
[40] T. 84.
[41] T. 834.
[42] At the hearing, the defense presented testimony regarding multiple psychometric considerations, such as norm obsolescence (the Flynn effect). It appears to this Court that the Flynn effect should not be applied. Quince v. State, 241 So. 3d 58, 61 (Fla. 2018) ("As many courts have already recognized, *Hall* does not mention the Flynn effect and does not require its application to all IQ scores in *Atkins* cases."). Notably, the defense's own witness, Dr. Cunningham, testified that his understanding was that the Florida Supreme Court does not consider norm obsolescence or the Flynn effect. T. 177. Dr. Prichard testified that the Flynn effect is a "scientific phenomenon" though it is "not to the point where it can be applied on intellectual measures." T. 910 Nevertheless, even when the childhood IQ scores are considered in light of psychometric considerations such as the standard error of measurement, norm obsolescence, and sampling errors as testified to by defense witness Dr. Cunningham, this Court's conclusion is unchanged in this case because even the "corrected" scores do not suggest subaverage intellectual functioning. See T. 77-84.
[43] Defendant's Written Closing Argument, page 49, filed on September 20, 2021 (emphasis added).

The defense presented evidence that Defendant's academic performance was generally poor, and ultimately he was placed in emotionally handicapped classes. The defense presented evidence regarding academic testing, including the Wide Range Achievement Test ("WRAT") and Peabody Individualized Achievement Test. However, Dr. Prichard testified that those tests are not "intelligence tests" but are "academic screening instruments."[44] Dr. Prichard testified that "a person's intelligence does not always match up with their academic functioning and their academic performance on those instruments."[45] Dr. Prichard testified that those instruments are "not utilized in determining that first prong; that is, significantly subaverage intellectual functioning."[46] Indeed, defense witness Dr. Cunningham admitted that "poor academic performance doesn't necessarily reflect poor intellectual capability . . . ."[47]

Notably, although records and testimony show that Defendant's academic performance was often poor, a WRAT administered to Defendant in 1982 when he was in eighth grade provided data indicating that his performance was at the high school level, except for spelling.[48] Nevertheless, despite that evidence of good academic performance, in that same year Defendant's behavioral and emotional issues had "become so significant" that he was placed at "Camp E-Ma-Chamee," a highly structured program.[49] Dr. Prichard testified that comments by school employees in the records indicate that Defendant "appears to have the capacity for academic success, but his behavior is getting in the way of academic

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[44] T. 783.
[45] T. 784.
[46] T. 784.
[47] T. 149.
[48] T. 354.
[49] T. 214-215.

progress."[50] That assessment appears accurate because although Defendant's behavior was clearly problematic, he nevertheless obtained a full-scale IQ score in 1982 of 101 (as discussed earlier), showing strongly that his intellectual functioning was in the average range.

Defendant's other IQ scores were obtained years after his arrest and prosecution. In 1991, at about age 24, Defendant obtained a full-scale IQ score of 72 (a remarkable drop of 29 points from his prior score of 101 at age 14), and later in 2006, at age 39, he obtained a full-scale IQ score of 74.[51]

The near 30-point drop in IQ scores begs the question of whether the scores obtained by Defendant as an adult are credible representations of his IQ.

Dr. Mills testified that it is uncommon for a person's IQ to drop 29 points in ten years.[52] Dr. Prichard also testified that such a drop in IQ is uncommon.[53] Dr. Prichard testified that IQ is "considered a static trait."[54] Dr. Prichard testified that he was "not able to find any records that would suggest . . . a reasonable accounting for that dramatic drop over a ten-year period."[55] Dr. Prichard explained that he did not "see anything, for example, a

[50] T. 834-835.
[51] T. 53, 799.
[52] T. 593.
[53] T. 799.
[54] T. 800-801.
[55] T. 800-801.

traumatic brain injury that would account for a 29 point decline . . . ."[56] Dr. Prichard ultimately concluded that the IQ scores obtained by Defendant as an adult are representative of an "intentional underperformance of Mr. Walls."[57]

In regard to the adult IQ scores, the defense presented testimony and argument that it would be difficult for a person to replicate psychometrically identical scores over 15 years apart. For example, Dr. Hagerott testified that it would be "near impossible" for a person to replicate a psychometrically identical score over 15 years.[58]

However, Dr. Prichard credibly rejected the assertion that it is difficult to malinger on an IQ test.[59] Dr. Prichard explained that on an IQ test, the "skills get harder incrementally . . . ."[60] Dr. Prichard testified that people successfully malinger by recognizing when the test becomes harder, and "they deliberately don't get it right or perform slowly . . . ."[61]

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[56] T. 747. In regard to the decline in IQ scores, defense witness Dr. Cunningham testified that the decline could be explained by various issues, including high fevers in early childhood, a suicide attempt at about age 12 where Defendant was "found unconscious hanging by a bathrobe belt from a doorknob," and playing a "passout game." T. 88. However, Dr. Mills testified that he found no declines in Defendant's intelligence after any strangulation episode. T. 600. Dr. Cunningham testified that there were "at least two, *perhaps* three episodes of viral meningitis." T. 88. (emphasis added). Dr. Cunningham testified that the first occurred at age 12, and "*maybe* another one in between and then another recurrence of viral meningitis at age 15." T. 88. (emphasis added). However, the only diagnosed case of meningitis occurred when Defendant was age 12. T. 604. This Court does not find these circumstances to constitute the most likely explanation for the decline in IQ scores, for at least the reason that Defendant—despite experiencing various health events—obtained a valid IQ score of 101 at age 14, years after these events occurred.

[57] T. 747.

[58] T. 239.

[59] T. 906-907.

[60] T. 906.

[61] T. 907. The defense argues that Dr. Prichard's conclusions regarding malingering are not credible, in part because he administered a test of memory malingering ("TOMM") when he met with Defendant in 2017, and Defendant passed the test. However, Dr. Prichard credibly explained that a finding independent of the TOMM test can occur when "the malingering scale doesn't match up with your own clinical analysis of his behavior . . . ." T. 758. Dr. Prichard's testimony is credible when considering Defendant's IQ scores obtained prior to his commission of the murders, the fact that there is no competent, substantial evidence of significant brain trauma to support the near 30-point drop in IQ scores Defendant obtained after his arrest and prosecution, and the fact that Defendant's presentation in the phone calls to his family (discussed later in this order) is inconsistent with intellectual disability.

As to considerations other than IQ scores, Dr. Cunningham testified that both the "AAIDD and DSM-5 deemphasized the IQ score as they call for simultaneous consideration of adaptive skills" and "gathering clinical information that would inform intellectual functioning . . . ."[62] Dr. Cunningham also testified that neuropsychological testing "provides a more comprehensive standardized assessment than IQ testing does alone."[63] Dr. Cunningham testified that at age 16, a neuropsychological assessment administered by Dr. [Edward] Chandler on Defendant showed cerebral dysfunction and "delays in processing."[64] Dr. Hagerott, who administered a neuropsychological battery of Defendant in 1992, testified that her evaluation of him was consistent with Dr. Chandler's evaluation.[65]

However, Dr. Prichard testified that neuropsychological testing is "not an individualized, standardized intelligence test, so I don't think it's prudent and scientifically appropriate to suggest it is an IQ test."[66] Indeed, the neuropsychological testing results do not persuade this Court to find that Defendant has proven significantly subaverage intellectual functioning.

Dr. Prichard testified that he has conducted about 2,000 evaluations to determine intellectual disability over the past 25 years.[67] Dr. Prichard testified that he interviewed Defendant on June 28, 2017.[68] Dr. Prichard testified that Defendant's presentation was "strange" and "really didn't match up with" his experience with intellectually disabled

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[62] T. 66.
[63] T. 92.
[64] T. 94.
[65] T. 217.
[66] T. 835.
[67] T. 718.
[68] T. 817.

people.[69] Dr. Prichard testified that his "impression" was that Defendant "was messing around." Dr. Prichard testified that during the evaluation, there were times when Defendant began talking like he was a child.[70] Dr. Prichard explained that "intellectually disabled people typically don't behave that way especially when they get later in life."[71]

Dr. Prichard testified that Defendant's presentation in phone calls made to his family from prison was not consistent with intellectual disability.[72] Dr. Prichard noted how Defendant told his brother on a phone call that he's on a "modification diet" and had "been up to 312 and now he's down to 296."[73] Dr. Prichard testified that when he met with Defendant, he asked him "how much he weighed and how tall he was, and [Defendant] had to get his badge and look at his badge to tell me, which was a big, red flag for me."[74] Dr. Prichard testified that in considering "the fluid nature of the dialogue with his family, it seems like he can communicate that stuff just fine."[75] Ultimately, Dr. Prichard diagnosed Defendant with ADHD, conduct disorder, and antisocial personality disorder and found that he is not intellectually disabled.[76]

This Court has also considered the evidence regarding deficits in adaptive behavior, and although the Court finds that Defendant has deficits (as discussed in more detail later in this Order), the evidence presented regarding adaptive deficits does not persuade this Court to conclude that Defendant has significantly subaverage intellectual functioning. Notably,

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[69] T. 755-756.
[70] T. 756.
[71] Dr. Barry Crown testified that he observed Dr. Prichard's interview and testing of Defendant, and in general, Dr. Crown disagreed with Dr. Prichard's characterization of Defendant's behavior. T. 932-937.
[72] T. 918.
[73] T. 814.
[74] T. 815.
[75] T. 815.
[76] T. 828-829.

although Defendant exhibited academic and behavioral problems throughout his youth, he nevertheless *consistently* obtained IQ scores during that time that are clearly outside of any range of concern for intellectual disability. The defense has not presented competent, substantial evidence that those IQ scores are invalid.

Although the two IQ scores obtained by Defendant as an adult in 1991 and 2006 suggest significantly subaverage intellectual functioning when considering the SEM, *both* the defense and the State presented testimony that the large drop in IQ that those scores indicate is uncommon. Further, there is no competent, substantial evidence of any traumatic event that would show that Defendant's IQ scores in 1991 and 2006 represent his full efforts.

Although the defense presented testimony to suggest that a variety of medical events and circumstances caused Defendant's intellectual functioning to decline over time, the fact remains that despite those events, Defendant consistently obtained IQ scores reflecting average intellectual functioning. Although the defense argues that the cumulative effect of various events, including voluntary substance abuse, could explain the decline in IQ scores, that evidence is not of such weight that it produces a firm belief, without hesitation, that Defendant has significantly subaverage intellectual functioning.

This Court finds that Dr. Prichard's testimony is most credible on this matter, and the most credible explanation for the decline shown in the IQ scores in 1991 and 2006 is an intentional underperformance by Defendant.

Therefore, for the above reasons, Defendant fails the first prong of the test for intellectual disability.

Adaptive Behavior

Dr. Martell testified that Defendant has deficits in all three domains, conceptual, social, and practical, and that the deficits were in existence prior to age 18.[77] Dr. Prichard testified that Defendant's school records showed "serious deficits in adaptive skills and especially in [the] social domain."[78] Dr. Prichard testified that Defendant had adaptive deficits in the practical domain as a child.[79] Dr. Prichard testified that Defendant had adaptive deficits in the conceptual domain as a juvenile.[80] Dr. Prichard was not sure that Defendant presently has adaptive deficits, stating that Defendant is currently in a restrictive environment.[81]

There is some conflicting testimony and evidence regarding adaptive behavior. For example, Dr. Martell testified that during his examination of Defendant on April 17, 2019, Defendant stuttered, mumbled, and stammered.[82] However, Dr. Martell testified that he listened to Defendant's prison phone calls and did *not* recall hearing Defendant stutter in them.[83]

Further, Dr. Cunningham testified that during his interview with Defendant, he "exhibited limited vocabulary" and did not understand the word "symptoms" and the word "floss."[84] Dr. Cunningham testified that Defendant exhibited "delayed word retrieval."[85] Similarly, James Sewell testified that during his representation of Defendant concerning his

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[77] T. 341.
[78] T. 802-803.
[79] T. 862.
[80] T. 863.
[81] T. 862-863.
[82] T. 327.
[83] T. 436.
[84] T. 113.
[85] T. 114.

retrial in 1992, Defendant appeared to have a limited vocabulary and was easily distracted.[86] Mr. Sewell testified that it appeared to him that Defendant had issues with his memory.[87] Dr. Hagerott testified that during her observation of Defendant in 1992 he had difficulty accessing words, slurred his speech, and his "articulation was poor."[88]

However, in the phone calls from 2017 that Defendant made from prison, this Court finds that Defendant in general did not appear to struggle with word retrieval, memory, or that his articulation was poor. The conversations appeared fluid, and Defendant initiated and prompted conversational topics to his family members.

Although there is some conflicting evidence regarding adaptive behavior, both the defense and the State presented testimony that Defendant had adaptive deficits as a child. The defense also presented evidence suggesting that Defendant presently has deficits in adaptive behavior. Dr. Prichard's testimony as to present deficits was inconclusive.

Based on these circumstances, this Court finds no basis to disregard the testimony presented by the defense and State, and therefore this Court finds that Defendant satisfies the second prong of the test for intellectual disability. However, Defendant's adaptive deficits are not of a severity that would suggest his intellectual functioning is comparable to that of a person with significantly subaverage intellectual functioning.

Age of Onset

Because Defendant fails to satisfy the first prong of the test for intellectual disability, Defendant's claim fails. Nevertheless, *even if* Defendant's IQ scores as an adult were a true

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[86] T. 283-284.
[87] T. 286.
[88] T. 226.

representation of his intellectual functioning at the time of those tests, he fails to show by clear and convincing evidence that significantly subaverage intellectual functioning manifested prior to age 18.

Dr. Ouaou's testimony focused on brain development, and he testified that the developmental period is considered to extend to approximately age 25.[89] Defendant points to various instances of illnesses, including a diagnosis of meningitis at age 12, to argue that subaverage intellectual functioning with concurrent adaptive deficits manifested prior to age 18. The defense points to evidence that Defendant was hospitalized at about age 2 or 3 for Roseola,[90] and that at age 5 he was placed on Ritalin for ADHD.[91] There is evidence that Defendant hit his head against another child's head while playing volleyball at about age 12.[92]

However, as noted earlier, Defendant *consistently* obtained average IQ scores as a child. Although Defendant was hospitalized in 1979 at about age 12 with meningitis, his IQ score about two years later at age 14 was essentially consistent with his prior IQ score, which indicates to this Court that Defendant's intellectual functioning was unaffected by that illness or any other condition or event in Defendant's history relied on by Defendant. Notably, Dr. Mills testified that "in general insults to the brain are evident within weeks to months and occasionally years."[93] Indeed, the Court finds that weeks, months, and years passed after the occurrence of many of the events argued by the defense, and yet Defendant's IQ scores throughout that period of time remained consistently average.

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[89] T. 653.
[90] T. 551.
[91] T. 550; 586.
[92] T. 557.
[93] T. 541, 548.

In sum, there is no competent, substantial evidence showing that any of the health issues, events, and diagnoses argued by the defense affected Defendant's intellectual functioning. Defendant's behavior and school performance were problematic from an early age and continued to remain problematic throughout his school years, while his IQ remained average. Even if, hypothetically speaking, Defendant presently has significantly subaverage intellectual functioning, the evidence presented by the defense is not of such weight to produce a firm belief, without hesitation, that the condition manifested prior to age 18. Therefore, Defendant fails to show by clear and convincing evidence that he satisfies the third prong of the test for intellectual disability.

Conclusion as to Intellectual Disability

Defendant fails to show clear and convincing evidence that he satisfies the first and third prongs of the test for intellectual disability. Even if Defendant had satisfied the first prong, he fails to show clear and convincing evidence that the condition manifested prior to age 18, and therefore, he is not entitled to relief.

As to Defendant's argument that Florida law violates federal law and clinical standards to the extent that it would prevent this Court from conforming its decision to professional standards, this Court is bound to follow the law of the State of Florida, including the procedural rules promulgated by the Supreme Court of Florida and its caselaw. State v. Lott, 286 So. 2d 565, 566 (Fla. 1973).

CHANGE IN THE LAW

This Court held the evidentiary hearing on Defendant's claim and considered it on the merits because this Court previously concluded that it was constrained to do otherwise based on the Walls mandate.[94] However, now with the clarified guidance Nixon provides on the law of the case doctrine, this Court finds that Defendant's claim should be denied because Hall does not apply retroactively, and therefore Defendant is not entitled to reconsideration of whether he is intellectually disabled.

Ruling

Therefore, it is **ORDERED AND ADJUDGED** that Defendant's intellectual disability claim is **DENIED**.

Defendant has the right to appeal within 30 days of the rendition of this Order.

DONE AND ORDERED in Fort Walton Beach, Okaloosa County, Florida.

WFS/eeb

[94] Walls v. State, 213 So. 3d 340 (Fla. 2016).

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Judicial Assistant

Copies furnished to the following via U.S. mail by the Clerk:

Frank A. Walls, DC# 112850, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083

IN THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT, OKALOOSA COUNTY, FLORIDA

STATE OF FLORIDA CASE #(S) 1987 CF 000856 A

-VS-

WALLS, FRANK ATHEN

CERTIFICATE OF SERVICE

Pursuant to FRCP 3.850(i), this is to certify that a copy of the preceding order in the above styled cause to the following:

☐ Office of the State Attorney, via electronic mail.

☒ By US mail to:

Frank A Walls DC#112850
Union Correctional Institution
P.O. Box 1000
Raiford,FL 32083

Dated this 22 day of November, 20 21.

JD Peacock II
Clerk of Circuit Court and Comptroller

By: Marilyn Smith
Deputy Clerk

Supreme Court of Florida

No. SC15-1449

FRANK A. WALLS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[October 20, 2016]
CORRECTED OPINION

PER CURIAM.

This case is before the Court on appeal from an order summarily denying a motion to vacate a sentence of death under 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), Florida Constitution. For the reasons that follow, we reverse the summary denial of Walls' intellectual disability claim and remand for the circuit court to conduct an evidentiary hearing under the appropriate standards.

FACTS AND PROCEDURAL HISTORY

We have described the facts of this case as follows:

> Frank A. Walls was convicted of felony murder in the death of Edward Alger and premeditated and felony murder in the death of Ann Peterson in Okaloosa County in July 1987. Alger's and Peterson's bodies were discovered in Alger's home when he failed to report for duty at Eglin Air Force Base. Peterson was shot twice in the head; Alger was shot three times and his throat had been cut. Alger's feet and left wrist were also tied with a curtain cord.
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> Based on information given to investigators by Walls' former roommate, who lived adjacent to the victims, a warrant was obtained to search the mobile home where Walls lived with a roommate. During the search, several items were seized that were linked to the crime scene.
>
> After his arrest, Walls gave a statement detailing his involvement in the murders. In his confession, Walls stated that he entered the house to commit a burglary and that he deliberately woke up the two victims by knocking over a fan. Walls made Peterson tie up Alger and then Walls tied up Peterson. At some point, Alger got loose from the bindings and attacked Walls. Walls tackled Alger and cut him across the throat with a knife. However, Alger continued to struggle, knocked the knife from Walls' hand, and bit Walls on the leg. Walls then pulled out a gun and shot Alger in the head several times. Walls untied Peterson and informed her that he did not originally intend to harm them, but Alger's attack had changed everything. During a struggle, Walls ripped off Peterson's clothes and shot her in the head. When Peterson continued to scream, Walls pushed her face into a pillow and shot her in the head a second time.

Walls v. State (Walls III), 926 So. 2d 1156, 1161 (Fla. 2006). Walls was charged with ten offenses, some of which were subsequently dismissed or reduced at trial. Walls v. State (Walls II), 641 So. 2d 381, 384 (Fla. 1994).

> Walls pled not guilty and filed several pretrial motions, including a motion to determine his competency to stand trial. Five experts testified, three stating Walls was incompetent and two finding he was competent. The trial judge agreed with the latter two experts and held that Walls was competent to stand trial. The jury found Walls guilty of all charges submitted and later recommended life imprisonment for the murder of Alger and death for the murder of

> Peterson. The trial judge concurred. The conviction later was reversed and a new trial ordered.

Id. at 385 (citing Walls v. State (Walls I), 580 So. 2d 131 (Fla. 1991)).

> At Walls' retrial, venue was moved to Jackson County because of pretrial publicity. The State's guilt phase evidence consisted of physical evidence, testimony by the investigating officers, testimony by a pathologist, and Walls' taped confession, which was played for the jury. Walls presented no guilt phase case. The jury found Walls guilty on all charges—two counts of first-degree murder, burglary of a structure, armed burglary of a dwelling, and two counts of kidnapping and petit theft.
>
> During the penalty phase, Walls presented evidence of his long history of violent and threatening behavior, his various emotional problems, and his extensive treatment for emotional problems, including placement in a class for emotionally handicapped students in elementary school and a stay in a residential youth camp for children with emotional and behavioral problems at age fifteen. A psychiatrist who had treated Walls when he was sixteen years old stated that he had placed Walls on lithium in order to control his bipolar mood disorder. However, the psychiatrist also testified that at some point Walls ceased taking the drug. A psychologist testified that Walls' IQ had declined substantially in the years prior to trial and that Walls was impaired during the time the murder was committed.
>
> The jury recommended the death penalty for Peterson's murder by a unanimous vote. Because of the prior jury's recommendation of life, double jeopardy precluded the possibility of a death penalty for Alger's murder on retrial. See [Walls II, 641 So. 2d at 386 n.1]; see also art. I, § 9, Fla. Const. The judge sentenced Walls to death for Peterson's murder, to a life sentence for Alger's murder, to five years in prison for the burglary of a structure, to twenty years for the armed burglary of a dwelling, to twenty years for each of the kidnapping counts, and to two months for petit theft.

Walls III, 926 So. 2d at 1162.

As to Walls' death sentence, the judge found six aggravators: prior violent felony for the contemporaneous murder of Alger; committed during a burglary or

kidnapping; committed to avoid lawful arrest; committed for pecuniary gain; the murder was especially heinous, atrocious, or cruel (HAC); and the murder was cold, calculated, and premeditated (CCP). Walls II, 641 So. 2d at 386. The judge specifically rejected the existence of the statutory mental health mitigators, but found nine mitigating factors: Walls had no significant criminal history, was nineteen years old at the time of the crime, had been classified as emotionally handicapped, suffers from brain dysfunction and brain damage, functions intellectually at the level of a twelve year old because of his low IQ, confessed to the crimes and cooperated with the police, has a loving relationship with his parents and disabled sibling, is a good worker when employed, and has shown kindness to helpless people and animals. Walls III, 926 So. 2d at 1162.

On direct appeal after the retrial, Walls raised nine issues:

> (1) the trial court should have excused a potential juror for cause or granted the defense an additional peremptory challenge to excuse the juror; (2) the State improperly exercised peremptory challenges to dismiss two black jurors based on their race; (3) the jurors were kept in session for overtaxing hours during trial; (4) the trial court gave the jury erroneous penalty phase instructions on the mitigating factors of mental disturbance, impairment, or duress and on the aggravating factors of HAC and CCP; (5) the trial court refused to provide the jury with a detailed interpretation of emotional disturbance as a mitigating factor; (6) the trial court made errors in its findings on the aggravating factors because HAC and CCP were not proven beyond a reasonable doubt, the evidence did not support the conclusion that the murder occurred during a kidnapping, the commission during a burglary aggravating factor impermissibly doubled the pecuniary gain factor, and the avoid arrest aggravator was improper; (7) the trial court required Walls to prove the mitigating factors by a preponderance of

> the evidence; (8) the trial court improperly rejected expert testimony that Walls was suffering from extreme emotional disturbance and substantial impairment; and (9) the death sentence was not proportionate in his case. This Court found no error and affirmed the judgment and sentences. The United States Supreme Court subsequently denied Walls' petition for certiorari. See Walls v. Florida, 513 U.S. 1130 (1995).

Id. at 1162-63 (citation omitted).

Walls filed his initial postconviction motion in 1997, amending it later that year and again in 2001. Id. at 1163. The second amended motion raised nine claims:

> (1) [Walls] was denied a fair guilt phase proceeding due to ineffective assistance of counsel, prosecutorial misconduct, and trial court error; (2) counsel conceded guilt and eligibility for the death penalty without Walls' consent; (3) he was denied a fair penalty phase proceeding due to ineffective assistance of counsel, prosecutorial misconduct, and trial court error; (4) counsel failed to obtain an adequate mental health evaluation in violation of Ake v. Oklahoma, 470 U.S. 68 (1985); (5) his death sentence is unconstitutional because he is mentally retarded; (6) the trial court did not independently weigh the aggravating and mitigating circumstances; (7) the trial court considered inadmissible victim impact evidence; (8) the jury was improperly instructed on the aggravating factors; and (9) the cumulative effect of these procedural and substantive errors deprived him of a fair trial.

Id. at 1163 n.1.[1] The circuit court held an evidentiary hearing on some of Walls' claims, but eventually denied relief on all of them. Id. at 1163-64.

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

Walls appealed the denial to this Court raising two claims encompassing several subclaims: the circuit court erred in (1) denying Walls' ineffective assistance of counsel claims for counsel's "failure to exclude and object to the admission of evidence of a possible sexual battery, failure to object to a lack of remorse argument by the prosecutor during closing argument, concession of guilt to the facts of felony murder and to the aggravating factor of commission during a burglary, and failure to object to a number of other prosecutorial comments and arguments"; and (2) denying Walls an evidentiary hearing on his other five ineffective assistance of counsel claims[2] and his claim that his death sentence is improper because he is intellectually disabled. Id. at 1164-65, 1169-70. This Court affirmed the denial of relief as to all but Walls' intellectual disability claim. This Court found no error in denying a hearing on that claim because this Court adopted Florida Rule of Criminal Procedure 3.203[3] subsequent to the circuit

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2. These claims were that counsel failed to present: (1) expert testimony on the effects of Ritalin, (2) a pharmacologist's testimony about the effects of Walls' drug and alcohol use, (3) an adequate mental health evaluation including a PET scan to show brain damage, and (4) lay testimony on mitigation. Claim (5) was that counsel should have filed a motion asserting that the death penalty was barred by double jeopardy because retrial was caused by the prosecutor's misconduct. Walls III, 926 So. 2d at 1169-70.

3. This rule allows death-sentenced prisoners to file motions for determination of intellectual disability even in cases where their direct appeal proceedings are final. Id. at 1174. The rule defines "intellectual disability" as having three elements: (1) significantly subaverage intellectual general functioning that (2) exists concurrently with deficits in adaptive behavior and which has (3)

court's ruling. Id. at 1174. Thus, this Court stated, "Walls may still file a rule 3.203 motion for a determination of [intellectual disability] as a bar to execution in the trial court and is entitled to an evidentiary hearing on that motion." Id.

On June 23, 2006, Walls filed his first successive postconviction motion pursuant to rules 3.203 and 3.851, raising only the intellectual disability claim. On July 10, 2007, the circuit court held an evidentiary hearing at which defense expert Dr. Jethro Toomer and State expert Dr. Harry McClaren testified regarding Walls' mental condition. The court denied relief on July 16, 2007, finding no intellectual disability because Walls' lowest IQ score of 72 did not meet the definition of subaverage intellectual functioning then in place, which required an IQ of 70 or below.[4] This Court affirmed, finding "no evidence that Walls has ever had an IQ of 70 or below." Walls v. State (Walls IV), 3 So. 3d 1248 (Fla. 2008) (table).

On May 26, 2015, Walls filed his second successive postconviction motion, under rules 3.851 and 3.852. The next day, he filed another motion with the same title as the first and an amended version—both of which do not differ in substance from the one filed on May 26. In these motions, Walls argued that his death

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manifested itself prior to age 18. Fla. R. Crim. P. 3.203; see also § 921.137, Fla. Stat. (2006).

4. Walls' IQ scores are as follows: 102 at age 12, 101 at age 14, 72 at about age 23, and 74 at approximately age 40.

sentence was unconstitutional under Atkins v. Virginia, 536 U.S. 304 (2002), because the United States Supreme Court's decision in Hall v. Florida, 134 S. Ct. 1986 (2014), changed the definition of subaverage intellectual functioning to now include IQ scores that are 75 or below. Because Walls' intellectual disability hearing was directed at satisfying the unconstitutional definition of an IQ that is 70 or below, Walls requested a new hearing.

The circuit court held a hearing on July 6, 2015, intending to conduct a case management conference, under Huff v. State, 622 So. 2d 982 (Fla. 1993), to decide whether an evidentiary hearing was necessary on Walls' motion. However, Walls' counsel, Harry Brody, informed the court that he was not prepared to argue the motion and was intending to withdraw from Walls' case due to his current retired status among other issues. The State argued that because the circuit court was required to conduct the Huff hearing within ninety days of when the State filed its answer to the 3.851 motion—which was filed on June 12, 2015—the court should hear argument as to that issue only and require Brody to file a separate motion to withdraw.

As to the Huff issue, the State then asserted that the court could summarily deny Walls' motion as a matter of law because even with the new cut-off of 75, Walls was required to demonstrate onset before age 18 and none of his IQ scores from before he turned 18 were below 75. In response, Brody presented limited

argument explaining that in his opinion, Hall expressly rejected such a rigid approach and instead required courts to look at other aspects of a defendant's background, rather than just an IQ score. The court then ended the hearing, stating it would issue its ruling in writing, and requested that Brody move forward with filing his motion to withdraw.

On July 10, 2015, the circuit court issued its order summarily denying Walls' second successive 3.851 motion without granting a hearing. The court did not expressly rule on whether Hall applied retroactively to Walls' case, stating that although the Eleventh Circuit Court of Appeals had opined that Hall does not have retroactive application,[5] the procedural history of Haliburton v. State, 163 So. 3d 509 (Fla. 2015) (table), at least implicitly gives retroactive application to Hall.[6] However, the circuit court found that even if Hall were to apply, Walls would not be entitled to relief because his only IQ scores below 75 were received after he had turned 18: his scores were 102 at age 12, 101 at age 14, 72 at about age 23, and 74 at about age 40. Accordingly, the court found that Walls could not demonstrate

5. See In re Hill, 777 F.3d 1214, 1223 (11th Cir. 2015); In re Henry, 757 F.3d 1151, 1159 (11th Cir. 2014).

6. In Haliburton v. Florida, 135 S. Ct. 178 (2014), the United States Supreme Court remanded the defendant's intellectual disability claim to this Court for reconsideration in light of Hall. On remand, this Court remanded to the trial court for an evidentiary hearing under rule 3.203. Haliburton, 163 So. 3d at 509.

subaverage intellectual functioning that manifested prior to age 18. In addition, the circuit court found that Walls had already received the relief Hall allows because Walls had had the benefit of an earlier hearing at which he presented evidence regarding all three prongs of the test for intellectual disability. Thus, the court found he was not entitled to another evidentiary hearing, despite the new interpretation from Hall. Walls now appeals from the circuit court's denial of relief, arguing that the circuit court erred in (1) summarily denying the claim and (2) ruling that Walls' intellectual disability did not manifest before age 18. Due to our ruling on the first of these two issues, we find it unnecessary to address the second issue.

ANALYSIS

Walls' postconviction motion is based on his prior evidentiary hearing having been decided under a rule of law that has now been found unconstitutional under the Supreme Court's decision in Hall. If Hall does not apply retroactively, Walls has no basis on which to claim relief. Therefore, we address the retroactivity of Hall first.

I. Retroactive Application of Hall

In Hall, the United States Supreme Court declared Florida's definition of intellectual disability unconstitutional because it required an IQ score of 70 or below to demonstrate subaverage intellectual functioning. See 134 S. Ct. at 1990.

Prior to the decision in Hall, a Florida defendant with an IQ score above 70 could not be deemed intellectually disabled and, therefore, was barred from presenting evidence regarding the other two prongs of the test for intellectual disability: adaptive functioning deficits and manifestation before age 18. Id. at 1994. This was true despite the medical community considering evidence of these other two prongs to be probative of intellectual disability even for individuals whose IQ scores were above 70. Id. The Supreme Court found that the mandatory IQ cutoff of 70 violated established medical practices in two ways: first, by taking "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence," and second, by relying on a "purportedly scientific measurement of the defendant's abilities"—his IQ score—without recognizing that the measurement itself has an inherent margin of error, resulting in a ranged score rather than a single numerical value. Id. at 1995. The Court also held that the determination of intellectual disability is a "conjunctive and interrelated assessment" such that no single factor can be considered dispositive. Id. at 2001. Accordingly, the Court held that Florida's strict cutoff "creates an unacceptable risk that persons with intellectual disability will be executed" in violation of Atkins and is, therefore, unconstitutional. Id. at 1990.

We must first determine whether Hall warrants retroactive application under Witt v. State, 387 So. 2d 922 (Fla. 1980), before deciding whether Hall applies to

Walls' case. A change in the law will only apply retroactively if the change "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." Id. at 931. Developments of fundamental significance are likely to fall within one of two categories: changes of law that either "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" or are "of sufficient magnitude to necessitate retroactive application" under the retroactivity test of Stovall v. Denno, 388 U.S. 293, 297 (1967), and Linkletter v. Walker, 381 U.S. 618, 636 (1965). Id. at 929. It is without question that the Hall decision emanates from the United States Supreme Court and is constitutional in nature. Thus, we must determine whether Hall constitutes a development of fundamental significance. To do so, we first consider whether it is a change of law that "place[s] beyond the authority of the state the power to regulate certain conduct or impose certain penalties." Id.

The Supreme Court's rejection of Florida's mandatory IQ score cutoff means defendants with IQ scores that are higher than 70 must still be permitted to present evidence of all three prongs of the test for intellectual disability. The Hall decision requires courts to consider all prongs of the test in tandem. As we have recognized, this means that "if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of the other

prongs." Oats v. State, 181 So. 3d 457, 467-68 (Fla. 2015). The rejection of the strict IQ score cutoff increases the number of potential cases in which the State cannot impose the death penalty, while requiring a more holistic review means more defendants may be eligible for relief. Accordingly, the Hall decision removes from the state's authority to impose death sentences more than just those cases in which the defendant has an IQ score of 70 or below. We find that Hall warrants retroactive application as a development of fundamental significance that places beyond the State of Florida the power to impose a certain sentence—the sentence of death for individuals within a broader range of IQ scores than before. Cf. Falcon v. State, 162 So. 3d 954, 961-62 (Fla. 2015) (rejecting State's argument that because a Supreme Court decision only invalidated a statute as applied to a specific subgroup of people, the decision was only a procedural refinement such that retroactive application was unnecessary). Finding that Hall does apply retroactively, we next address the merits of Walls' appeal.

II. Applying Hall to This Case

In applying Hall to Florida, we have recognized the Supreme Court's mandate that all three prongs of the intellectual disability test be considered in tandem and that the conjunctive and interrelated nature of the test requires no single factor to be considered dispositive. Oats, 181 So. 3d at 459, 467 (citing Hall, 134 S. Ct. at 2001; Brumfield v. Cain, 135 S. Ct. 2269, 2278-82 (2015)).

Reviewing this case, it is clear that although Walls has had an earlier evidentiary hearing as to intellectual disability and was allowed to present evidence of all three prongs of the test, he did not receive the type of holistic review to which he is now entitled. Also, Walls' prior hearing was conducted under standards he could not meet because he did not have an IQ score below 70—a fact which may have affected his presentation of evidence at the hearing. Because Walls' prior evidentiary hearing was directed toward satisfying the former definition of intellectual disability and was reviewed by the circuit court with the former IQ score cutoff rule in mind, we remand for the circuit court to conduct a new evidentiary hearing as to Walls' claim of intellectual disability.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
PARIENTE, J., concurs with an opinion.
PERRY, J., concurs in result.
CANADY, J., dissents with an opinion, in which POLSTON, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PARIENTE, J., concurring.

I fully concur in the majority opinion that Walls is entitled to a new evidentiary hearing pursuant to Hall v. Florida, 134 S. Ct. 1986, 1990 (2014). I write separately to express my belief that to fail to give Walls the benefit of Hall, which disapproved of Cherry v. State, 959 So. 2d 702 (Fla. 2007), would result in a

manifest injustice, which is an exception to the law of the case doctrine. In State v. Owen, this Court held that it has the power to reconsider and correct erroneous rulings in exceptional circumstances, where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case. 696 So. 2d 715, 720 (Fla. 1997). The Owen Court also held that an 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. Id.

Contrary to the dissent's suggestions, this Court appropriately holds that Hall should be given retroactive effect. See Canady, J., dissenting op. at 22. The decision is not a mere evolutionary refinement in the law. Hall specifically held that Florida's method for determining those who are ineligible for execution violates the Eighth Amendment:

> The Florida statute, as interpreted by its courts, misuses IQ score on its own terms; and this, in turn, bars consideration of evidence that must be considered in determining whether a defendant in a capital case has an intellectual disability. Florida's rule is invalid under the Constitution's Cruel and Unusual Punishment Clause.

Hall, 134 S. Ct. at 2001.

Moreover, as this Court explained in Oats v. State, Hall changed the manner in which evidence of intellectual disability must be considered, stating: "[C]ourts 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 the other prongs." Oats, 181 So. 3d 457, 467-68 (Fla. 2015).

Militating against the "ongoing threat of major disruption to the application of the death penalty resulting from giving retroactive effect to Hall," not all capital defendants will be entitled to relief under Hall. See Canady, J., dissenting op. at 7. As this Court determined in an unpublished Order in the case of Rodriguez v. State, those defendants who did not timely raise a claim under Atkins v. Virginia, 536 U.S. 304 (2002), and pursuant to Florida Rule of Criminal Procedure 3.203, should not be entitled to relief under Hall. Rodriguez, No. SC15-1278 (Fla. Aug. 9, 2016). In that order, we stated:

> Rodriguez, who had never before raised an intellectual disability claim, asserted that there was "good cause" pursuant to Rule 3.203(f) for his failure to assert a previous claim of intellectual disability and only after the United States Supreme Court decided Hall v. Florida, 134 S. Ct. 1986 (2014), did he have the basis for asserting an intellectual disability claim. The trial court rejected the motion as time barred, concluding there was no reason that Rodriguez could not have previously raised a claim of intellectual disability based on Atkins v. Virginia, 536 U.S. 304 (2002). The trial court further concluded that Rodriguez could not have relied on Cherry v. State, 959 So. 2d 702 (Fla. 2007), which established the bright-line cut-off of 70 for IQ scores disapproved of in Hall, because he never raised an intellectual disability claim after Atkins as required by Rule 3.203.
>
> We have considered the issues raised, and affirm the trial court's denial of Rodriguez's motion as time-barred for the reasons stated by the trial court.

Id.

Turning to this case, the trial court relied, in part, on this Court's decision in Cherry in denying Walls relief. The bright-line cut-off of 70 for IQ scores announced in Cherry and relied on by the trial court in Walls' case has been explicitly rejected by the United States Supreme Court's decision in Hall. Hall, 134 S. Ct. at 2000. Specifically, the trial court in this case denied Walls relief on his intellectual disability claim because Walls' lowest IQ score of 72 did not meet the definition of subaverage intellectual functioning, as interpreted by Cherry. See majority op. at 7. This Court affirmed the trial court's decision, finding "no evidence that Walls has ever had an IQ of 70 or below." Walls v. State (Walls IV), 3 So. 3d 1248 (Fla. 2008).

Because Walls' 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 creating a manifest injustice if we did not apply Hall to Walls. Walls has yet to have "a fair opportunity to show that the Constitution prohibits [his] execution." Hall, 134 S. Ct. at 2001. "Uniquely, capital punishment . . . connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." Witt v. State, 387 So. 2d 922, 326 (Fla. 1980).

More than fundamental fairness and a clear manifest injustice, the risk of executing a person who is not constitutionally able to be executed, trumps any other considerations that this Court looks to when determining if a subsequent decision of the United States Supreme Court should be applied. At stake in this case is a principle that could not be better expressed than in the words of Justice Kennedy writing for the majority in Hall:

> 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.

134 S. Ct. at 2001. For all these reasons, I concur with the majority opinion that Walls is entitled to a new evidentiary hearing pursuant to the United States Supreme Court's decision in Hall.

CANADY, J., dissenting.

The trial court's order denying Walls' claim should be affirmed. In reversing the trial court's order, the majority makes three fundamental errors. First, the majority ignores a deficiency in Walls' case—his failure to show juvenile onset—that bars him from success on his claim of intellectual disability. Second, the decision here goes on needlessly to consider Hall v. Florida, 134 S. Ct. 1986

(2014), and in the process misconstrues the holding in Hall. Third, the Court erroneously concludes that Hall should be given retroactive application.

I.

This case is easily resolvable without any discussion of the scope of Hall's holding regarding IQ scores or consideration of whether Hall should be applied retroactively. The trial court correctly denied Walls' intellectual disability claim because the evidence showed without dispute that as a juvenile Walls had IQ scores of 102 (at age 12) and 101 (at age 14). Based on these IQ scores, Walls could not establish that he met the third prong of the test for intellectual disability, which requires that the condition be "manifested during the period from conception to age 18." § 921.137(1), Fla. Stat. (2006). This requirement of juvenile onset was not at issue and played no part in the Court's analysis in Hall. So nothing in Hall supports the conclusion that the third prong does not remain a valid requirement of law. The third prong therefore defeats Walls' claim. And the trial court's rejection of the claim on that basis should be affirmed.

II.

The majority states that Hall requires that "defendants with IQ scores that are higher than 70 must still be permitted to present evidence of all three prongs of the test for intellectual disability." Majority op. at 12. According to the majority, Hall requires that "no single factor . . . be considered dispositive" but that every

intellectual disability claim must instead be given "holistic review." Majority op. at 11, 13, 14. Thus, by the reasoning of the majority, an individual with an IQ of 80, 100, 125, or 150 would nonetheless—as part of the "holistic review" process—be entitled to present evidence of adaptive deficits to establish intellectual disability. But this is not consistent with what the Supreme Court actually decided in Hall.

Hall declared unconstitutional Florida's "rigid rule" "defin[ing] intellectual disability to require an IQ test score of 70 or less"—a rule that failed to take into account the 5-point standard error of measurement (SEM) for IQ tests. Hall, 134 S. Ct. at 1990. The Court was crystal clear concerning the question at issue: "That strict IQ score cutoff of 70 is the issue in this case." Id. at 1994. In line with that statement of the issue, the Court noted that "Petitioner does not question the rule in States which use a bright-line cutoff at 75 or greater." Id. at 1996. Therefore, contrary to the majority's mandate of "holistic review," nothing in Hall calls into question the statutory provision that intellectual disability can be established only if a person suffers from "significantly subaverage general intellectual functioning," which "means performance that is two or more standard deviations from the mean score on a standardized intelligence test." § 921.137(1). That threshold, independent requirement should not be cast aside in the name of "holistic review." Contrary to the majority's reasoning, Hall recognizes that the existence of an IQ

score evidencing significantly subaverage general intellectual functioning is a threshold requirement for determining whether an individual is intellectually disabled: "For professionals to diagnose—and for the law then to determine—whether an intellectual disability exists once the SEM applies and the individual's IQ score is 75 or below the inquiry would consider factors indicating whether the person had deficits in adaptive functioning." Hall, 134 S. Ct. at 1996 (emphasis added).

The holding of Hall is that the SEM must be taken into account in determining whether an individual is intellectually disabled. Throughout its opinion, the Court in Hall focuses on Florida's failure to consider the SEM. And the Court repeatedly identifies that failure as the basis for its decision. The Court observed that "[t]he clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of Atkins[v. Virginia, 536 U.S. 304 (2002),]" and that "those clinical definitions have long included the SEM." Id. at 1999. The Court went on to state that "[b]y failing to take into account the SEM and setting a strict cutoff at 70, Florida 'goes against the unanimous professional consensus.' APA Brief 15." Id. at 2000. In line with that consensus, the Court announced its "independent assessment that an individual with an IQ test score 'between 70 and 75 or lower,' Atkins, supra, at 309, n.5, 122 S. Ct. 2242, may show intellectual disability by

presenting additional evidence regarding difficulties in adaptive functioning." Id. Thus, the Court "agree[d] with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." Id. at 2001. The Court reiterated: "By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning." Id. So when an individual's IQ score is determined to be greater than 75—and the SEM thus has been taken into account—the holding of Hall has no bearing on the case.

III.

I reject the majority's conclusion that Hall should be given retroactive application under Witt v. State, 387 So. 2d 922 (Fla. 1980), "as a development of fundamental significance that places beyond the State of Florida the power to impose a certain sentence." Majority op. at 13. Contrary to the majority's reasoning, Hall places no categorical limitation on the authority of the state to impose a sentence of death. Hall requires that the SEM of IQ tests be considered, but it does not preclude death sentences for individuals whose scores fall within the SEM. Although Hall's IQ score fell within the SEM, the Court recognized that his score was not sufficient to establish that he was intellectually disabled: "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, 134 S. Ct. at 2001; see also In re Henry, 757 F.3d 1151, 1161 (11th Cir. 2014) (holding in the context of federal habeas corpus review that Hall has no retroactive effect because it does not articulate a "rule placing a class of individuals beyond the state's power to execute" but "merely provides new procedures for ensuring that States do not execute members of an already protected group").

I would also conclude that Hall is not a change in the law of "fundamental significance" under the Stovall/Linkletter[7] test adopted in Witt for determining "changes of law which are of sufficient magnitude to necessitate retroactive application." Witt, 387 So. 2d at 929, 931. This test recognizes

> that the essential considerations in determining whether a new rule of law should be applied retroactively are essentially three: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.

Id. at 926. In Witt, the Court recognized that under this test "evolutionary refinements"—in contrast to "jurisprudential upheavals"—do not warrant retroactive application:

7. Stovall v. Denno, 388 U.S. 293 (1967); Linkletter v. Walker, 381 U.S. 618 (1965).

> In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.

Id. at 929-30. Hall represents just such an evolutionary refinement in the law. I thus would conclude that Hall should not be given retroactive effect under the Stovall/Linkletter test based on (a) Hall's purpose of adjusting at the margin the definition of IQ scores that evidence significant subaverage intellectual functioning, (b) the State's reliance on Cherry's[8] holding in numerous cases over an extended period of time, and (c) the ongoing threat of major disruption to application of the death penalty resulting from giving retroactive effect to Hall as well as similar future changes in the law regarding aspects of the definition of intellectual disability.

Finally, I would conclude that Hall does not constitute "a new substantive rule of constitutional law" for which federal law requires retroactive application.

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8. Cherry v. State, 959 So. 2d 702, 712-13 (Fla. 2007) (holding that SEM need not be taken into account), cert. denied, 552 U.S. 993 (2007), abrogated by Hall v. Florida, 134 S. Ct. 1986 (2014).

Montgomery v. Louisiana, 136 S. Ct. 718, 729 (2016). The Supreme Court has explained this category of substantive rules that must be given retroactive effect:

> Substantive rules, then, set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful. Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating "the manner of determining the defendant's culpability." Schriro[v. Summerlin, 542 U.S. 348, 353 (2004)]; Teague[v. Lane, 489 U.S. 288, 313 (1989) (plurality opinion)]. Those rules "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." Schriro, supra, at 352. Even where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and, by extension, the defendant's continued confinement may still be lawful. For this reason, a trial conducted under a procedure found to be unconstitutional in a later case does not, as a general matter, have the automatic consequence of invalidating a defendant's conviction or sentence.

Id. at 729-30. The Court thus has recognized that retroactive application is appropriate because the "possibility of a valid result does not exist where a substantive rule has eliminated a State's power to proscribe the defendant's conduct or impose a given punishment." Id. at 730; see also Welch v. United States, 136 S. Ct. 1257, 1266 (2016) ("[T]he Court has adopted certain rules that regulate capital sentencing procedures in order to enforce the substantive guarantees of the Eighth Amendment. The consistent position has been that those rules are procedural, even though their ultimate source is substantive.").

In explaining why states should be required to give retroactive effect to such new substantive rules, the Court stated:

> [T]he retroactive application of substantive rules does not implicate a State's weighty interests in ensuring the finality of convictions and sentences. Teague warned against the intrusiveness of "continually forc[ing] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." 489 U.S., at 310. This concern has no application in the realm of substantive rules, for no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose.

Montgomery, 136 S. Ct. at 732.

The change in the law accomplished by Hall does not render any sentence "by definition, unlawful." Id. at 730. Hall "merely raise[s] the possibility" that someone found not to be intellectually disabled could be determined to be intellectually disabled. Id. (quoting Schriro, 542 U.S. at 352). And if Hall is given retroactive application, the state will most certainly be required to "marshal resources" to sustain death sentences that have been imposed. Id. at 732 (quoting Teague, 489 U.S. at 310). The rule adopted by Hall therefore is not a substantive rule that is required to be given retroactive effect under federal law.

POLSTON, J., concurs.

An Appeal from the Circuit Court in and for Okaloosa County,
William Francis Stone, Judge - Case No. 461987CF000856XXXAXX

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