In the Supreme Court of Florida

FRANK A. WALLS,

Appellee,

v.

CASE NO.: SC22-72
CAPITAL CASE

STATE OF FLORIDA,

Appellant.
_____/

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

AMENDED ANSWER BRIEF

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

CHARMAINE M. MILLSAPS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
primary email:
capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com

COUNSEL FOR THE STATE

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PRELIMINARY STATEMENT

The record on appeal will be referred to as "2022 Succ. PCR" followed by the appropriate page number which is at the bottom center of the page. Appellant, FRANK A. WALLS, the defendant in the trial court, will be referred to as appellant, the defendant, or by his proper name. The initials "IB" refers to the initial brief, followed by the appropriate page number. All double underlined emphasis is supplied.

STATEMENT REGARDING ORAL ARGUMENT

This Court typically does not conduct an oral argument in successive postconviction appeals and certainly should not do so in a case raising an issue that is not retroactive under this Court's current controlling precedent.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is a successive postconviction appeal of an intellectual disability claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002), in a capital case. In 2006, and again in 2015, Walls filed successive

postconviction motions raising intellectual disability claims, despite having a perfectly normal IQ a minor. *Walls v. State*, 213 So.3d 340, 349 (Fla. 2016) (Canady, J., dissenting) (noting the "evidence showed without dispute that as a juvenile Walls had IQ scores of 102 (at age 12) and 101 (at age 14)). This Court remanded this case to the trial court to conduct a second evidentiary hearing on the claim, after holding that *Hall v. Florida*, 572 U.S. 701 (2014), applied retroactivity. *Walls v. State*, 213 So.3d 340 (Fla. 2016), *overruled by Phillips v. State*, 299 So.3d 1013 (Fla. 2020), *cert. denied*, *Phillips v. Florida*, 141 S.Ct. 2676 (2021). On remand, the trial court held an extensive, multi-day evidentiary hearing in compliance with this Court's mandate and then denied the claim on both non-retroactivity grounds and on the merits.

Procedural history of the intellectual disability claim

On June 23, 2006, Walls filed a rule 3.203 motion raising a claim of intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002). Fla. R. Crim. P. 3.203. The trial court held an evidentiary hearing in July of 2007. At the first evidentiary hearing, Dr. Jethro Toomer, a forensic psychologist, testified for the defense and Dr. Harry McClaren, a forensic psychologist, testified for the State. (PC Vol. II

222; PC Vol. II 188-189). The trial court concluded that there was "no evidence" to support a finding that Walls was intellectually disabled. The Florida Supreme Court affirmed the trial court's denial of the first motion raising an intellectual disability claim. *Walls v. State*, 3 So.3d 1248 (Fla. 2008) (SC07-2007) ("*Walls IV*").

On May 27, 2014, the United States Supreme Court in *Hall v. Florida*, 572 U.S. 701 (2014), invalidated Florida's bright-line cut-off of an IQ score of 70. The *Hall* Court held that Florida's practice of failing to take into account the standard error of measurement (SEM) violated the Eighth Amendment. The Supreme Court observed that "intellectual disability is a condition, not a number." *Id.* at 723. The *Hall* Court held a defendant whose IQ score fell within the SEM "must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits" at an evidentiary hearing. *Id.* at 723.

On May 26, 2015, Walls filed a successive rule 3.851 postconviction motion raising a claim of intellectual disability again based on the then recent decision of *Hall v. Florida*. (PC Vol. I 1-7, 15-22). Walls argued that both IQ scores testified by the experts at

the first evidentiary hearing, 72 and 74, were within the statistical error of measurement required by *Hall v. Florida*. The trial court summarily denied the successive motion. (PC Vol. I 46-50). The trial court noted that Walls' IQ scores prior to his 18th birthday were 102 and 101. (PC Vol. I 49). The trial court noted these scores did not place Walls in the range of concern at issue in *Hall v. Florida*. (PC Vol. I 49). The trial court also reasoned that Walls already received a hearing on intellectual disability, at which he was permitted to present evidence regarding each of the three prongs. (PC Vol. I 49). The trial court noted that the defense's own expert at the prior evidentiary hearing, Dr. Toomer, had testified that Walls did not meet the juvenile onset prong of the test for intellectual disability. (PC Vol. I 49 citing pages 40-41 of the July 2007 hearing). The trial court denied the second motion because Walls' IQ scores did not place him within the scope of *Hall v. Florida* and he had already had a full evidentiary hearing on the issue. (PC Vol. I 50).

On October 20, 2016, the Florida Supreme Court remanded this case to the trial court to conduct a second evidentiary hearing on the intellectual disability claim. *Walls v. State*, 213 So.3d 340 (Fla. 2016)

(SC15-1449), *cert. denied*, *Florida v. Walls*, 138 S.Ct. 165 (2017). The Florida Supreme Court ordered a second evidentiary hearing be conducted based on *Hall v. Florida*. The Florida Supreme Court in *Walls* held that *Hall v. Florida* was retroactive. *Walls*, 213 So.3d at 345-46 (using the state test for retroactivity established in *Witt v. State*, 387 So.2d 922 (Fla. 1980)). The *Walls* Court stated that "all three prongs" of the intellectual disability test must be "considered in tandem" and that "the conjunctive and interrelated nature of the test requires no single factor to be considered dispositive." *Walls*, 213 So.3d at 346-47. The Florida Supreme Court stated that Walls did not receive the type of "holistic review" at the first evidentiary hearing which he "is now entitled" to under *Hall v. Florida*. *Id.* at 347.

On October 25, 2016, Capital Collateral Regional Counsel - Middle (CCRC-M), entered a notice of appearance in the Florida Supreme Court.

On January 10, 2017, Walls, represented by CCRC-M, filed a third successive motion raising three claims based on *Hurst v. Florida*, 577 U.S. 92 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). (2022 Succ. PCR 205-259). On January 19,

2017, the State filed an answer to the successive postconviction motion. (2022 Succ. PCR 267-292). On July 17, 2018, the postconviction court held a hearing on the *Hurst* claim. On July 20, 2018, the postconviction court denied the *Hurst* claim.

The State filed a petition for writ of certiorari in the United States Supreme Court. *Florida v. Walls*, 138 S.Ct. 165 (2017). The State's petition was denied on October 2, 2017.

The evidentiary hearing was tentatively scheduled for February of 2019. The evidentiary hearing was then rescheduled for March 23-30, 2020, but was cancelled due to the pandemic.

On May 29, 2020, over a year before the evidentiary hearing was conducted, the State filed a motion to summarily deny the intellectual disability claim in the lower court based on this Court's then recent decision in *Phillips v. State*, 299 So.3d 1013 (Fla. 2020), *cert. denied*, *Phillips v. Florida*, 141 S.Ct. 2676 (2021). (2022 Succ. PCR 3560-3576). The State explained that under the current law of *Phillips*, which would apply in any subsequent appeal, the entire claim would be denied solely on non-retroactivity grounds and therefore, an evidentiary hearing would be futile. Alternatively, the State suggested that the

postconviction court hold an evidentiary hearing to comply with the court's mandate and the mandate statute but limit the evidentiary hearing to evidence regarding the third prong of onset of the condition as a minor because the third prong was dispositive of the entire claim on the merits. On June 29, 2020, CCRC-M filed a response. (2022 Succ. PCR 3584-3640). The trial court held a hearing on the motion for summary denial. On November 20, 2020, the trial court ordered supplemental briefing. (2022 Succ. PCR 3699-3701). On January 11, 2021, the State filed a supplemental brief. (2022 Succ. PCR 3702-3732). On January 19, 2021, CCRC-M filed a supplemental brief. (2022 Succ. PCR 3733-3783). On February 8, 2021, the trial court denied the State's motion for summary denial. (2022 Succ. PCR 3790-3792).

At the hearing, the State made an oral motion to limit the evidence at the upcoming evidentiary hearing to evidence of the critical third prong. On April 12, 2021, the defense filed a written response to the State's oral motion. (2022 Succ. PCR 3803-3810). On May 24, 2021, the trial court denied the State's oral motion to limit the presentation

of evidence at the evidentiary hearing to the third prong. (2022 Succ. PCR 3815-3817).

On June 29, 2021, through July 7, 2021, the postconviction court held a six-day evidentiary hearing on the intellectual disability claim. The defense presented seven witnesses, including six experts, at the second evidentiary hearing: 1) Dr. Mark D. Cunningham; 2) Dr. Karen P. Hagerott; 3) retired Assistant Public Defender James C. Sewell, Jr.; 4) Dr. Daniel A. Martell; 5) Dr. Mark J. Mills; 6) Dr. Robert Ouaou; and 7) Dr. Barry M. Crown as a rebuttal witness. The State presented Dr. Gregory Prichard, as its expert on intellectual disability.

On July 15, 2021, the trial court entered an order denying the defense motion to exclude the testimony of the State's expert, Dr. Prichard. (2022 Succ. PCR 6012-6016).

On September 20, 2021, the State and defense filed simultaneous post-evidentiary hearing memorandums of law. (2022 Succ. PCR 6017-6118); (2022 Succ. PCR 6119-6187). On September 22, 2021, the defense filed a motion to strike the State's post-evidentiary hearing memorandum of law. (2022 Succ. PCR 6188-6194). On September 24, 2021, the State filed a response to the motion to strike. (2022

Succ. PCR 6195-6210). On September 27, 2021, the defense filed a reply. (2022 Succ. PCR 6211-6214). On October 8, 2021, the trial court denied the motion to strike but permitted opposing counsel to file an answer to the State's memorandum regarding retroactivity and permitted the State to file a reply. (2022 Succ. PCR 6215-6219).

On October 22, 2021, the defense filed additional briefing regarding retroactivity. (2022 Succ. PCR 6223-6237). On October 25, 2021, the State filed a reply. (2022 Succ. PCR 6238-6257).

On November 22, 2021, the trial court denied the intellectual disability claim both on non-retroactivity grounds and on the merits, making findings regarding all three prongs of the statutory test for intellectual disability. (2022 Succ. PCR 6258-6279).

On December 6, 2021, the defense filed a motion for rehearing. (2022 Succ. PCR 6280-6293). The next day, the postconviction court ordered the State to respond to the rehearing. On December 13, 2021, the State filed a written response to the motion for rehearing. (2022 Succ. PCR 6297-6323). On December 16, 2021, the trial court denied the rehearing. (2022 Succ. PCR 6324-6326).

This appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE I

Walls asserts that the postconviction court improperly denied the intellectual disability claim on non-retroactivity grounds. IB at 12. Walls' sentence was final years before the decision in *Hall v. Florida*, 572 U.S. 701 (2014). *Hall v. Florida* does not apply retroactively to Walls at all. The trial court properly followed this Court's current precedent of *Phillips v. State*, 299 So.3d 1013 (Fla. 2020), *cert. denied*, *Phillips v. Florida*, 141 S.Ct. 2676 (2021). It is the current law that governs on appeal and the current law is *Phillips*. The intellectual disability claim should be denied solely on non-retroactivity grounds without addressing any of the other issues raised in the appeal or the merits of the claim, as this Court recently did in *Nixon v. State*, 327 So.3d 780, 783 (Fla. 2021), *pet. for cert. filed*, No. 21-1173 (U.S. Feb 24, 2022). Opposing counsel invokes various prohibitions on relitigation, such as the mandate statute, finality-of-judgment principles, the law-of-the-case doctrine and due process, to assert that this Court must address the claim of intellectual disability on the merits. Indeed, this Court recently affirmed the denial of an intellectual disability claim on

non-retroactivity grounds, in a case where the trial court refused to conduct an evidentiary hearing, despite a mandate to do so. *Thompson v. State*, __ So.3d__, 47 Fla. L. Weekly S99, 2022 WL 969126 (Fla. Mar. 31, 2022). Alternatively, the trial court fully complied with this Court's earlier mandate when it held a multi-day evidentiary hearing at which Walls was allowed to present any evidence he wished on all three prongs of the statutory test for intellectual disability. This Court should affirm the denial of the claim based solely on *Phillips*.

ISSUE II

Walls asserts the postconviction court improperly denied the objection to the State's intellectual disability expert's testimony. Walls also asserts the postconviction court improperly denied the motion to determine the intellectual disability claim by the preponderance standard of proof rather than the clear and convincing standard of proof required by the statute. Walls additionally asserts the postconviction court improperly denied the motion for a jury determination of intellectual disability. All three of these issues are the functional equivalent of moot, in light of this Court decision in *Phillips v. State*, 299 So.3d 1013 (Fla. 2020), *cert. denied*, *Phillips v.*

Florida, 141 S.Ct. 2676 (2021). Once a court determines that a claim is not retroactive, all the subsidiary issues, including the merits of the claim, are rendered moot. The entire analysis ends with the determination of non-retroactivity. Alternatively, the postconviction court properly denied all three motions.

ISSUE III

Walls is not intellectually disabled. As the postconviction court properly found, he fails the third prong of the statutory test for intellectual disability. Under the statute and this Court's precedent, the failure to establish all three prongs, means the *Atkins* claim fails. In Justice Canady's words, evidence shows that, as a juvenile, Walls had a normal IQ. *Walls v. State*, 213 So.3d 340, 349 (Fla. 2016) (Canady, J., dissenting). The evidence at the second evidentiary hearing again showed Walls' IQ as a teenager, even after his bout with viral meningitis, was normal. The average of his three IQ scores as a minor is 97. Walls' IQ as a minor was perfectly normal. The claim fails on the third prong alone. Walls is not intellectually disabled.

ARGUMENT

ISSUE I

WHETHER THE POSTCONVICTION COURT PROPERLY RULED THE DEFENDANT WAS NOT ENTITLED TO RETROACTIVE BENEFIT OF *HALL V. FLORIDA*, 572 U.S. 701 (2014). (Restated)

Walls asserts that the postconviction court improperly denied the intellectual disability claim on non-retroactivity grounds. IB at 12. Walls' sentence was final years before the decision in *Hall v. Florida*, 572 U.S. 701 (2014). *Hall v. Florida* does not apply retroactively to Walls at all. The trial court properly followed this Court's current precedent of *Phillips v. State*, 299 So.3d 1013 (Fla. 2020), *cert. denied*, *Phillips v. Florida*, 141 S.Ct. 2676 (2021). It is the current law that governs on appeal and the current law is *Phillips*. The intellectual disability claim should be denied solely on non-retroactivity grounds without addressing any of the other issues raised in the appeal or the merits of the claim, as this Court recently did in *Nixon v. State*, 327 So.3d 780, 783 (Fla. 2021), *pet. for cert. filed*, No. 21-1173 (U.S. Feb 24, 2022). Opposing counsel invokes various prohibitions on relitigation, such as the mandate statute, finality-of-judgment principles, the law-

of-the-case doctrine and due process, to assert that this Court must address the claim of intellectual disability on the merits. Indeed, this Court recently affirmed the denial of an intellectual disability claim on non-retroactivity grounds, in a case where the trial court refused to conduct an evidentiary hearing, despite a mandate to do so. *Thompson v. State*, __ So.3d__, 47 Fla. L. Weekly S99, 2022 WL 969126 (Fla. Mar. 31, 2022). Alternatively, the trial court fully complied with this Court's earlier mandate when it held a multi-day evidentiary hearing at which Walls was allowed to present any evidence he wished on all three prongs of the statutory test for intellectual disability. This Court should affirm the denial of the claim based solely on *Phillips*.

The postconviction court's ruling

The postconviction court's order denying the intellectual disability claim made factual findings and legal conclusions on all three prongs of the statutory test for intellectual disability but ultimately denied the claim on both the first and third prongs. (2022 Succ. PCR 6258-6279). The trial court, alternatively made the legal determination that *Hall v. Florida* did not apply retroactively to Walls under *Nixon* and "therefore,

Defendant was not entitled to reconsideration of whether he is intellectually disabled."

Standard of review

The standard of review regarding the issue of retroactivity is de novo because retroactively is a pure question of law. *Steiger v. State*, 328 So.3d 926, 929 (Fla. 2021) (reviewing a "pure" question of law de novo); *State v. Maisonet-Maldonado*, 308 So.3d 63, 66, n.2 (Fla. 2020) (stating that a double jeopardy claim based upon undisputed facts presents a pure question of law and is reviewed de novo" citing *Pizzo v. State*, 945 So.2d 1203, 1206 (Fla. 2006)).

Merits

Hall v. Florida is not retroactively applicable to Walls under the current law of *Phillips* and Nixon. Walls' convictions and sentences became final on Tuesday, January 24, 1995. *Walls v. Florida*, 513 U.S. 1130 (1995), which was many years before *Hall v. Florida* was decided in 2014. *Hall v. Florida* does not apply.

Retroactivity is a threshold issue

The retroactivity of *Hall v. Florida* is a threshold issue. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (stating that *Teague v. Lane*, 489 U.S.

288 (1989), is a threshold question in every habeas case); *Horn v. Banks*, 536 U.S. 266, 272 (2002) (explaining that a habeas court must conduct a threshold retroactivity analysis when the issue is properly raised by the state).

Current law governs on appeal

The current law in Florida is that *Hall v. Florida* is not retroactive under *Phillips* and *Nixon*. Since *Phillips*, this Court has repeatedly followed its current view that *Hall v. Florida* is not retroactive in numerous capital cases.[1] The general rule is that an appellate court must apply the law in effect at the time it renders its decision. *Henderson v. United States*, 568 U.S. 266, 271 (2013) (citing *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281, (1969), and *Ziffrin v. United States*, 318 U.S. 73, 78 (1943), and quoting Chief Justice

[1] *Pooler v. State*, 302 So.3d 744, 745(Fla. 2020) ("*Hall* does not apply retroactively" citing *Phillips*), *cert. denied*, *Pooler v. Florida*, 141 S.Ct. 2636 (2021) (No. 20-7228); *Cave v. State*, 299 So.3d 352, 353 (Fla. 2020) ("*Hall* does not apply retroactively" citing *Phillips*), *cert. denied*, *Cave v. Florida*, 141 S.Ct. 2705 (2021) (No. 20-6947); *Lawrence v. State*, 296 So.3d 892 (Fla. 2020) (denying a claim of intellectual disability because *Hall* is not retroactive under *Phillips*), *cert. denied*, *Lawrence v. Florida*, 141 S.Ct. 2676 (2021) (No. 20-6307). In all of these cases, as well as in *Nixon*, this Court denied relief based on *Phillips*.

Marshall in *United States v. Schooner Peggy*, 1 Cranch 103, 110, 2 L.Ed. 49 (1801)). Florida appellate courts, including this Court, agree that the decisional law in effect at the time an appeal is decided govern the appeal, even if there has been a change since time of trial (or evidentiary hearing). *Lowe v. Price*, 437 So.2d 142, 144 (Fla. 1983) (citing *Wheeler v. State*, 344 So.2d 244 (Fla.1977)); *Melton v. State*, 304 So.3d 375, 377 (Fla. 1st DCA 2020) (stating it is the decisional law in effect at the time an appeal is decided governs the issues raised on appeal, even where there has been a change of law since the time of trial citing *Wheeler*); *Deutsche Bank Nat'l Tr. Co. v. Torres*, 245 So.3d 985, n.1 (Fla. 3d DCA 2018) ("Generally, an appellate court must apply decisional law as it exists at the time of the appeal"); *cf. State v. Fleming*, 61 So.3d 399, 400 (Fla. 2011) (stating that "the decisional law effective at the time of the resentencing applies" to the resentencing);

The current law of *Phillips* was the law that governed this case in the trial court also because *Phillips* was decided and final before the evidentiary hearing was conducted. Indeed, the State filed a motion for summary denial of the claim over a year before the evidentiary

hearing relying on *Phillips* and arguing that the evidentiary hearing should be cancelled because regardless of what Walls proved at the second evidentiary hearing, the claim would be denied on appeal, as a matter of law, based solely on non-retroactivity grounds.

Phillips and *Nixon* govern this appeal.

Indistinguishable controlling precedent

In *Nixon v. State*, 327 So.3d 780, 783 (Fla. 2021), *pet. for cert. filed*, No. 21-1173 (U.S. Feb 24, 2022), this Court affirmed the postconviction court's denial of an intellectual disability claim following an evidentiary hearing on the claim. This Court did not address the intellectual disability claim on the merits in *Nixon*, despite there being a second extensive evidentiary hearing on the *Atkins* claim and despite the trial court having made detailed factual findings on all three prongs. *Nixon*, 327 So.3d at 782 (noting the trial court received evidence on all three prongs of the intellectual disability test at the second evidentiary hearing and then concluded that while Nixon "had presented clear and convincing evidence of adaptive deficits," he had "failed to establish the other two prongs—significantly subaverage intellectual functioning and manifestation by age 18"). Indeed, the

trial court in *Nixon* found that Nixon had established the second prong of adaptive functioning. The trial court in *Nixon* found the State's expert, Dr. Gregory Prichard, a forensic psychologist, to be more credible. *Id*. at 782. But none of those findings were reviewed by this Court.

Nixon is procedurally indistinguishable from this case. *Nixon* involves the same procedural history as this case does, including a remand for a second evidentiary hearing on an intellectual disability claim. Both cases were remanded by this Court under the prior precedent that *Hall v. Florida* applied retroactively. And in both cases, the trial court, in fact, held a full evidentiary hearing exploring all three prongs following the remand. Yet, in the appeal after the second evidentiary hearing in *Nixon*, this Court applied the current law of *Phillips* and held that *Hall v. Florida* did not apply retroactively to *Nixon* and then denied the claim solely on the basis of non-retroactivity. *Nixon* controls.

Retroactivity determination ends the analysis

This case begins and ends with the retroactivity analysis. Once a court determines that a case is not retroactive to the case before it,

that determination of non-retroactivity ends the analysis. *Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1333 (11th Cir. 2019) (refusing to address a harmful error argument after determining that the case did not apply retroactively citing *Beard v. Banks*, 542 U.S. 406, 410 n.2 (2004)); *Beard v. Banks*, 542 U.S. 406, 410 n.2 (2004) (refusing to address the merits once the determination of non-retroactivity was made). The determination of non-retroactivity renders all other issues in this appeal, including the merits of the intellectual disability claim, the functional equivalent of moot. *Cf. Singletary v. State*, 322 So.2d 551, 552 (Fla. 1975) (stating that courts should not pass upon the constitutionality of statutes if the case may be effectively disposed of on other grounds).

Prohibition on relitigation

Opposing counsel invokes various prohibitions on relitigation, such as the mandate statute, finality-of-judgment principles, the law-of-the-case doctrine and due process, to assert that this Court must conduct a full merits review of this case. But under this Court's current precedent of *Nixon* and *Thompson*, this Court ends all analysis of any intellectual disability claim with the determination of non-retroactivity. *see*

also Knight v. Fla. Dep't of Corr., 936 F.3d 1322, 1333 (11th Cir. 2019) (stating that "if a constitutional claim is *Teague*-barred, we do not reach its merits" citing *Beard v. Banks*, 542 U.S. 406, 410 n.2 (2004)).

Alternatively, even if any of these various principles and doctrines against relitigation applied, the trial court fully complied with this Court's mandate, when it conducted the five day evidentiary hearing at which Walls was permitted to present evidence on all three prongs of the statutory test for intellectual disability. The Florida Supreme Court's actual mandate to the trial court was "to conduct a new evidentiary hearing as to Walls' claim of intellectual disability" and then engage in "holistic review." *Walls*, 213 So.3d at 347; *id.* at 349 (Pariente, J., concurring) ("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*."). The trial court held the mandated evidentiary hearing and then addressed all three prongs. The mandate statute, § 43.44, Fla. Stat. (2022), was fully complied with.

The law-of-the-case doctrine and *State v. Okafor*, 306 So.3d 930 (Fla. 2020), do not apply. This Court in *Nixon* specifically stated that they were not overlooking the law of the case doctrine or *State v. Okafor*

when they decided the case on non-retroactivity grounds. *Nixon*, 327 So.3d at 783. This Court has already rejected this argument in *Nixon*. Additionally, *State v. Okafor* is easily distinguishable on other grounds as well. Here, unlike *Okafor*, the mandate statute is not at issue. The Florida Supreme Court's mandate in this case was to hold a second evidentiary hearing which was fully complied with by the trial court which held an expansive second evidentiary hearing at which opposing counsel was permitted to present evidence on all three prongs. The issue in *State v. Okafor* was that the Florida Supreme Court's mandate ordering a new resentencing was not complied with by the trial court because the trial court never held a second penalty phase, as it had been ordered to do by the Florida Supreme Court's opinion. There is no possible violation of the mandate statute, § 43.44, Fla. Stat. (2022), in this case unlike the situation in *State v. Okafor*. For both of these reasons, *State v. Okafor* does not apply.

Indeed, this Court recently in *Thompson v. State*, __ So.3d__, 47 Fla. L. Weekly S99, 2022 WL 969126 (Fla. Mar. 31, 2022), affirmed on the basis of *Phillips* in a case where the trial court refused to conduct

an evidentiary hearing ordered by this Court. Thomas death sentence became final in 1993. *Thompson*, 2022 WL 969126 at *1. Following *Hall v. Florida*, Thomas filed a seventh successive postconviction motion raising an intellectual disability claim again. *Id.* at *2. Relying on *Walls v. State*, 213 So.3d 340, 346 (Fla. 2016), this Court held that *Hall v. Florida* applied retroactively to Thompson and remanded for an evidentiary hearing. *Id.* at *2 (citing *Thompson v. State*, 208 So.3d 49, 50 (Fla. 2016)). But during the remand, this Court receded from *Walls* in *Phillips*. The State filed a motion for summary denial based on *Phillips* arguing there was no need for an evidentiary hearing under the current law. The trial court agreed and summarily denied the claim without conducting the evidentiary hearing that had been ordered by this Court.

On appeal, Thomas argued, relying on *State v. Okafor*, 306 So.3d 930, 933 (Fla. 2020), that the trial court was required to conduct an evidentiary hearing on the claim of intellectual disability, regardless of *Phillips*. *Thompson*, 2022 WL 969126 at *2. This Court distinguished *Okafor* explaining that the prior judgment vacating the death sentence

in that case had "wiped the slate clean as to that sentence, rendering it a nullity," and therefore, Okafor "was a convicted capital defendant without a sentence." But in Thomas' case, this Court's judgment ordering a new evidentiary hearing "did not vacate Thompson's death sentence." *Id.* at *3. This Court also rejected an argument based on the law-of-the-case doctrine citing *Nixon*. This Court explained that "Thompson could not succeed on his *Hall*-based intellectual disability claim," regardless of what he established at the evidentiary hearing, due to the non-retroactivity of *Hall* under the current law. The intellectual disability claim would fail as a matter of law under *Phillips*, regardless of what facts Thompson could prove at an evidentiary hearing. This Court refused to recede from *Phillips*. *Id.* at *3, n.6. This Court affirmed the trial court's summary denial of the claim.[2]

Here, as in *Thompson*, Walls could not succeed on his intellectual disability claim, regardless of what he established at the evidentiary hearing, due to the non-retroactivity of *Hall* under the current law. And, here, as in *Thompson*, the intellectual disability claim fails as a

[2] *Thompson* is not final as of May 31, 2022.

matter of law under *Phillips*, regardless of what facts Walls proved at an evidentiary hearing.

Opposing counsel also insists that *Phillips* violates *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and due process. IB at 32. But *Phillips* can hardly be said to be "unexpected," as required to establish a *Bouie* violation, in light of the other state and federal circuit courts that have agreed with *Phillips*, including the Eleventh Circuit in *In re Henry*, 757 F.3d 1151 (11th Cir. 2014). *See also Goodwin v. Steele*, 814 F.3d 901, 903–04 (8th Cir. 2014); *Payne v. State*, 493 S.W.3d 478, 490–91 (Tenn. 2016). And *Phillips* is certainly is not "indefensible," as required to establish a *Bouie* violation, in the wake of the United States Supreme Court's recent decisions in *Edwards v. Vannoy*, 141 S.Ct. 1547 (2021), and *Jones v. Mississippi*, 141 S.Ct. 1307 (2021). The United States Supreme Court in *Edwards* narrowed the federal test for retroactivity of *Teague v. Lane*, 489 U.S. 288 (1989). Only substantive criminal rules will now be retroactive. *Hall v. Florida* is procedural, not substantive. *Hall v. Florida* is not retroactive under *Teague*.

To the extent that *Hall v. Florida* is viewed as similar to *Montgomery v. Louisiana*, 577 U.S. 190 (2016), as being a mixture of substantive and procedural, the United States Supreme Court has disapproved of *Montgomery* and will not follow it in the future. The *Jones* Court noted that, despite the rule in fact being procedural, *Montgomery* had held that the rule was substantive for retroactivity purposes and therefore applied retroactively. *Jones*, 141 S.Ct. at 1317. But in a footnote, the *Jones* Court explained that it disagreed with the *Montgomery* decision and would not follow it in the future. *Jones*, 141 S.Ct. at 1317 n.4 (explaining that *Montgomery* was "in tension" with the Court's other retroactivity precedents). *Id.* at n.4. *Teague* does not violate due process and neither does this Court receding from *Walls* and holding *Hall v. Florida* is not retroactive in *Phillips*.

The trial court properly denied the intellectual disability claim on non-retroactivity grounds and that determination is the end of this appeal.

ISSUE II

WHETHER THE POSTCONVICTION COURT PROPERLY DENIED THE OBJECTION TO THE STATE EXPERT'S

TESTIMONY; PROPERLY DENIED THE MOTION TO DETERMINE THE INTELLECTUAL DISABILITY CLAIM BY THE PREPONDERANCE STANDARD OF PROOF; AND PROPERLY DENIED THE MOTION FOR A JURY DETERMINATION OF INTELLECTUAL DISABILITY? (Restated)

Walls asserts the postconviction court improperly denied the objection to the State's intellectual disability expert's testimony. Walls also asserts the postconviction court improperly denied the motion to determine the intellectual disability claim by the preponderance standard of proof rather than the clear and convincing standard of proof required by the statute. Walls additionally asserts the postconviction court improperly denied the motion for a jury determination of intellectual disability. All three of these issues are the functional equivalent of moot, in light of this Court decision in *Phillips v. State*, 299 So.3d 1013 (Fla. 2020), *cert. denied*, *Phillips v. Florida*, 141 S.Ct. 2676 (2021). Once a court determines that a claim is not retroactive, all the subsidiary issues, including the merits of the claim, are rendered moot. The entire analysis ends with the determination of non-retroactivity. Alternatively, the postconviction court properly denied all three motions.

Expert's testimony

Walls asserts that the testimony of the State's intellectual disability expert, Dr. Prichard, should not have been considered by the postconviction court. Walls claims that Dr. Prichard's testimony regarding malingering was "tainted" by his consideration of Dr. Marshall's and Dr. Perillo's evaluations, which this Court had previously determined were obtained in violation of *Massiah v. United States*, 377 U.S. 201 (1964), and *Malone v. State*, 390 So.2d 338 (Fla.1980). See *Walls v. State*, 580 So.2d 131, 134-35 (Fla. 1991). This Court remanding for new trial and prohibited any psychological evaluations that rely on the information obtained by Officer Beck. *Walls*, 580 So.2d at 135. It is doubtful that *Massiah* violations, in general, or this Court's prohibition, in particular, extends beyond the trial to state postconviction evidentiary hearings, much less to a second evidentiary hearing on an *Atkins* claim. *Cf*. *Davila v. Davis*, 137 S.Ct. 2058, 2066 (2017) (contrasting trials from direct appeals stating the trial "enjoys pride of place in our criminal justice system" that an appeal "does not" and observing the "trial is the main event" where the defendant is presumed innocent unlike the appeal where he is

presumed guilty); *Harris v. New York*, 401 U.S. 222, 226, (1971) (holding voluntary statements obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), are admissible for impeachment on cross-examination); *United States v. Jackson*, 713 Fed. Appx. 963, 968 (11th Cir. 2017) (holding that voluntary statements obtained in violation of *Miranda* may be considered at sentencing relying on *United States v. Nichols*, 438 F.3d 437, 443 (4th Cir. 2006), and *Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1388 (7th Cir. 1994) (en banc)).

But even assuming the prohibition extends to this evidentiary hearing, the issue is moot twice over. The entire evidentiary hearing, including any dispute about the State's expert's testimony, was rendered moot by *Phillips*. And second, even on the merits, the issue is moot because the intellectual disability claim totally fails on the third prong of onset alone and that prong does not depend on the State's expert's testimony in any manner. As Justice Canady observed, this case is "easily resolvable without any discussion" of *Hall v. Florida* because "the evidence showed without dispute" that as a juvenile Walls had IQ scores of 102 and 101 and therefore, he "could

not establish" the third prong and the third prong alone "defeats Walls' claim" of intellectual disability, regardless of retroactivity. *Walls v. State*, 213 So.3d 340, 349 (Fla. 2016) (Canady, J., dissenting). While Dr. Prichard's findings regarding malingering may impact the first prong of significantly subaverage intellectual functioning, the finding of malingering does not impact the third prong of onset as a minor at all. The third prong depends on objective scores from IQ tests that were given to Walls as a minor, years before any of these three experts evaluated Walls. These normal IQ scores were obtained years before the *Massiah* violation. Events that occurred many years earlier cannot be "tainted" by subsequent events. Walls' IQ scores as a minor were not tainted in any fashion by the *Massiah* violation. The trial court properly denied the motion to strike Dr. Prichard's testimony.

Clear and convincing standard of proof

Walls asserts that the postconviction court improperly denied his motion to determine the claim of intellectual disability by the preponderance of evidence standard of proof the rather than by the clear and convincing standard of proof required by the statute. IB at 47. Opposing counsel argues that *Cooper v. Oklahoma*, 517 U.S. 348 (1996),

requires that this Court declare the standard of proof in the intellectual disability statute, § 921.137(4), to be unconstitutional. But the non-retroactivity of *Hall v. Florida*, 572 U.S. 701 (2014), under the current law renders the entire issue of the standard of proof the functional equivalent of moot. Once a case is determined to be not retroactive the analysis ends and all of the associated issues, including the correct standard of proof, should not be addressed. Alternatively, on the merits, both the text of the statute and this Court's caselaw provide that the standard of proof for an intellectual disability claim is "clear and convincing" evidence. Furthermore, *Leland v. Oregon*, 343 U.S. 790 (1952), controls over *Cooper*. The postconviction court properly denied the motion and refused to declare the intellectual disability statute unconstitutional.

The postconviction court's ruling

On August 16, 2019, Walls filed a motion in limine regarding the appropriate standard of proof for a claim of intellectual disability. (2022 Succ. PCR 948-955). On August 28, 2019, the State filed a response to the motion asserting that the standard of proof for a claim

of intellectual disability is clear and convincing evidence, relying on the text of the statute and this Court's caselaw. (2022 Succ. PCR 958-979). On October 29, 2019, the postconviction court denied the motion concluding the appropriate standard of proof was clear and convincing evidence. (2022 Succ. PCR 1036-1040 citing *Medina v. State*, 690 So.2d 1241, 1246-47 (Fla. 1997) (explaining that *Cooper v. Oklahoma*, 517 U.S. 348 (1996), does not apply to a rule 3.812 proceeding to determine competency to be executed because the State's interest is "substantial," not "modest" as in *Cooper*; and citing *Provenzano v. State*, 750 So.2d 597, 603 (Fla. 1999)). The trial court, however, expressed its view that, due to the death penalty being a "unique and irreversible" punishment, the lower standard of proof of preponderance should apply, noting that a capital defendant is only required to prove other statutory mitigating circumstances by the preponderance standard (2022 Succ. PCR 1038-1039).

Preservation

The issue of the proper standard of proof was properly preserved for appeal. Postconviction counsel objected on the same ground below in the trial court that they now raise as an issue on appeal and

properly obtained a ruling from the trial court. § 924.051(3), Fla. Stat. (2022); *Sparre v. State*, 289 So.3d 839, 848 (Fla. 2019) (To preserve an issue for appellate review, a litigant must present the issue to the trial court in a timely, specific manner and obtain a ruling" citing *Corona v. State*, 64 So.3d 1232, 1242 (Fla. 2011), and *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008)). Opposing counsel filed a motion raising this same issue and obtained a ruling from the postconviction court.

Standard of review

The issue of the constitutionality of a standard of proof in a statute is a pure issue of law reviewed under the *de novo* standard. *United States v. Hunter*, 342 Fed. Appx. 493, 496 (11th Cir. 2009) (reviewing a claim regarding a clear and convincing standard of proof in a federal statute de novo citing *United States v. Gray*, 260 F.3d 1267, 1271 (11th Cir. 2001); *State v. Catalano*, 104 So.3d 1069, 1075 (Fla. 2012) ("A court's decision regarding the constitutionality of a statute is reviewed de novo as it presents a pure question of law."); *State v. Rubio*, 967 So.2d 768, 771 (Fla. 2007) ("Because each of these issues concern

questions of statutory constitutionality or construction, we review each issue de novo").

Dispositive threshold issue

The non-retroactivity of *Hall v. Florida*, 572 U.S. 701 (2014), under the current law of *Phillips* and *Nixon*, renders the entire issue of the standard of proof the functional equivalent of moot. Once a case is determined to be not retroactive, the analysis ends and all of the associated issues, including the correct standard of proof, should not be addressed. Standards of proof are related to the factual findings on the merits of a claim but due to non-retroactivity, the merits should not be reached. As the Eleventh Circuit has explained, if the case is not retroactive, the analysis stops completely. *Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1333 (11th Cir. 2019) (stating that "if a constitutional claim is *Teague*-barred, we do not reach its merits" citing *Beard v. Banks*, 542 U.S. 406, 410 n.2 (2004)); *Quince v. State*, 241 So.3d 58, 63 (Fla. 2018) (refusing to address constitutionality of the clear and convincing evidence standard of section 921.137(4), Florida Statutes, applicable to a claim of intellectual disability).

Merits

Alternatively, on the merits, the proper standard of proof for factual findings regarding the three prongs of the statutory test for intellectual disability is clear and convincing evidence.[3] The clear text of the applicable statute provides that the standard of proof is clear and convincing evidence. When the language of a statute is unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation; rather, the statute must be given its plain and obvious meaning. *Robinson v. State*, 329 So.3d 103, 106 (Fla. 2021) This Court has also stated, albeit in dicta, that the standard of proof for intellectual disability claims was

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[3] The "imposition of the death sentence upon an intellectually disabled defendant prohibited" statute, § 921.137(4), Florida Statutes (2021), provides:

> . . . At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has an intellectual disability. If the court finds, ***by clear and convincing evidence***, that the defendant has an intellectual disability as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.

(emphasis added).

clear and convincing evidence. *Haliburton v. State*, 331 So.3d 640, 650, 652 (Fla. 2021) (defining clear and convincing evidence and concluding the defense expert's testimony regarding the second prong did "not rise to the level of clear and convincing evidence" but declining to address the constitutional attack on that standard of proof because the claim failed under either standard); *Wright v. State*, 256 So.3d 766, 771 (Fla. 2018) ("a defendant must make this showing by clear and convincing evidence" citing § 921.137(4)), *cert. denied*, *Wright v. Florida*, 139 S.Ct. 2671 (2019); *but cf.* Fla. R. Crim P. 3.203(e) (not providing any particular standard of proof). The standard of proof for a claim of intellectual disability in Florida is "clear and convincing" evidence, not a "preponderance" of the evidence.

Cooper versus _Leland_

Opposing counsel relies heavily on *Cooper v. Oklahoma*, 517 U.S. 348 (1996), which held that requiring a defendant prove his incompetence to be tried by clear and convincing evidence violated the Due Process Clause. The United States Supreme Court observed that the right not to be tried if incompetent is a fundamental principle of justice so rooted in the traditions and conscience of our people that

its violation threatens the basic fairness of the trial itself. *Id.* at 364. The *Cooper* Court also noted that 46 states used a lower standard of proof, showing that Oklahoma's higher standard of proof was unnecessary. *Id.* at 361-62.

But, in *Leland v. Oregon*, 343 U.S. 790 (1952), the United States Supreme Court rejected a due process challenge to an Oregon statute that required the defendant prove insanity at the time of the crime at the beyond a reasonable doubt standard of proof. If Oregon's higher standard of beyond a reasonable doubt does not offend due process, Florida's lower standard of clear and convincing certainly does not. *Leland*, not *Cooper*, applies to the determination of intellectual disability.

Cooper is legally distinguishable as well. *Cooper* involved one opportunity and one standard of proof. But, unlike incompetency at issue in *Cooper*, capital defendants in Florida have two opportunities to prove intellectual disability and at two different standards of proof. The first opportunity is before the judge during the pre-trial hearing which requires a showing at the clear and convincing standard but

the defendant has a second opportunity to show low intelligence as mitigation before the jury during the penalty phase at the lower preponderance standard. *Colley v. State*, 310 So.3d 2, 16 (Fla. 2020) (stating that a trial court must find a proposed mitigating circumstance when the defendant has established that mitigator by the greater weight of the evidence), *cert. denied*, *Colley v. Florida*, 142 S.Ct. 144 (2021); *Coday v. State*, 946 So.2d 988, 1001 (Fla. 2006) (observing that mitigating circumstances are only required to be proven by the "greater weight of the evidence" citing *Campbell v. State*, 571 So.2d 415, 419 (Fla. 1990)). Indeed, the defendant at the penalty phase does not have to prove full-blown intellectual disability as defined by the statute at the penalty phase. Rather, he may present evidence of limited mental ability or low IQ that does not amount to intellectual disability but is still mitigating. A defendant is constitutionally entitled to present any type of mental impairment, such as learning disabilities or simply a low IQ score, as mitigation to the jury. *Sumner v. Shuman*, 483 U.S. 66, 76 (1987) (observing that the Eighth Amendment requires "that the sentencing authority be

permitted to consider any relevant mitigating evidence before imposing a death sentence" citing *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Hitchcock v. Dugger*, 481 U.S. 393 (1987)). Low intellectual functioning does not have to reach the level of statutory intellectual disability to be presented or considered as mitigating. And the defendant may prove mitigation at the penalty phase in front of the jury at the lower preponderance standard of proof. *State v. Grell*, 135 P.3d 696, 703 (Ariz. 2006). So, a capital defendant gets two opportunities to prove intellectual functioning as mitigation — one at the higher standard of proof which will preclude the death penalty altogether and another one at the lower standard of proof which will mitigate against a death sentence. Ultimately, every capital defendant has an opportunity to show limited mental functioning at the preponderance standard that opposing counsel insists is constitutionally mandated. *Cooper* did not involve a second chance to prove the matter at a lower standard of proof. For these reasons, *Cooper* does not apply.

Indeed, Walls himself had that opportunity at his penalty phase and his "low IQ" and functioning "intellectually at about the age of twelve or thirteen" which was found by the trial court to be a mitigating factor at the lower standard of proof of preponderance. *Walls v. State*, 213 So.3d 340, 342 (Fla. 2016) (noting two of the nine mitigating factors the trial court found was Walls "suffers from brain dysfunction and brain damage," and he "functions intellectually at the level of a twelve year old because of his low IQ"); *Walls v. State*, 926 So.2d 1156, 1162 (Fla. 2006) (noting a psychologist testified during the penalty phase "that Walls' IQ had declined substantially in the years prior to trial and that Walls was impaired during the time the murder was committed.").

Nor does the underlying rationale of *Hall v. Florida*, 572 U.S. 701 (2014), which reasoned that not accounting for the statistical error of measurement (SEM) increasing the risks that those who are, in fact, intellectually disabled will be unconstitutionally sentenced to death, establish any flaw in Florida's clear and convincing standard of proof. Opposing counsel speaks of the dangers of having a higher standard

of proof because intellectually disabled persons are poor witnesses unable to fully assist counsel in proving their disability. But it is experts that are critical to establishing intellectual disability and those experts testify at bench hearings. Experts are not poor witnesses and are quite able to assist counsel in establishing the facts regarding intellectual ability. Moreover, the third prong of onset can often be the determinative prong, just as it was in this case. The onset prong is based on objective criteria, such as IQ tests in school records, that do not depend on the defendant's capabilities as a witness or on the defendant's ability to recall facts to assist his attorney. For that reason, the concern regarding intellectually disabled persons being poor witnesses, who are unable to assist their counsel, is not a significant concern in intellectual disability claims.

Leland, not *Cooper*, controls.

Other state statutes and caselaw

Florida is not alone in requiring that a claim of intellectual disability be proven at the clear and convincing standard of proof. And most of the other state supreme courts with a similar standard of proof have rejected due process attacks on their respective statutes.

Three other death penalty states have statutes similar to Florida's statute regarding the standard of proof. Arizona, Colorado, and North Carolina statutes also require that capital defendants prove their intellectual disability at the clear and convincing standard of proof. See Ariz. Rev. Stat. § 13-753(G); Colo. Rev. Stat. § 18-1.3-1102; N.C. Gen. § 15A-2005(c)).[4] Both the Arizona Supreme Court and the Colorado Supreme Court have rejected due process challenges to the clear and convincing standard of proof for intellectual disability claims and to their respective equivalent state statutes.

The Arizona Supreme Court rejected a due process attack on the clear and convincing standard of proof in the Arizona statute, Ariz. Rev. Stat. § 13-753(G), in *State v. Grell*, 135 P.3d 696 (Ariz. 2006). The Colorado Supreme Court rejected both Eighth Amendment and due process attacks on the burden allocation and the clear and convincing standard of proof in *People v. Vasquez*, 84 P.3d 1019 (Colo. 2004); *but*

[4] Delaware also had a clear and convincing standard of proof for claims of intellectual disability by statute before the Delaware Supreme Court struck the state's death penalty statute. Del. Code Ann. Tit. 11, § 4209 (2005 Sess.) (providing for a clear and convincing standard of proof).

see Pruitt v. State, 834 N.E.2d 90 (Ind. 2005) (finding Indiana's statute, Ind. Code § 35-36-9-4 (2003), which provided for a clear and convincing standard of proof, to be unconstitutional). Florida's clear and convincing standard of proof for claims of intellectual disability is not an outlier.

Indeed, one state has an even higher standard of proof for such claims. Georgia's intellectual disability statute requires a defendant prove his intellectual disability at the even higher beyond a reasonable doubt standard of proof. Ga. Code § 17-7-131(c)(3).[5] In Georgia, a

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[5] The Georgia "Insanity, intellectual disability, and mental illness" statute, § 17-7-131, provides:

> (c) In all criminal trials in any of the courts of this state wherein an accused shall contend that he or she was insane, mentally ill, or intellectually disabled at the time the act or acts charged against him or her were committed, the trial judge shall instruct the jury that they may consider, in addition to verdicts of "guilty" and "not guilty," the additional verdicts of "not guilty by reason of insanity at the time of the crime," "guilty but mentally ill at the time of the crime," and "guilty but with intellectual disability."
>
> * * * *
>
> (3) The defendant may be found "guilty but with intellectual disability" if the jury, or court acting as trier of facts, finds ***beyond a reasonable doubt*** that the defendant is guilty of the crime charged and is with intellectual disability. If the court or

criminal defendant must prove beyond a reasonable doubt that he is intellectually disabled before he is ineligible for the death penalty. *Raulerson v. Warden*, 928 F.3d 987, 993 (11th Cir. 2019). The Georgia Supreme Court has repeatedly rejected constitutional challenges to that higher standard of proof. *Stripling v. State*, 711 S.E.2d 665 (Ga. 2011); *Head v. Hill*, 587 S.E.2d 613 (Ga. 2003). And the Georgia Supreme Court recently reaffirmed their prior holding that claims of intellectual disability in capital cases must be established at the beyond-a-reasonable-doubt standard of proof in *Young v. State*, 860 S.E.2d 746, 769 (Ga. 2021), *cert. denied*, 142 S.Ct. 1206 (2022). The Georgia Supreme Court distinguished *Cooper* as being based largely on historical grounds which are not present with claims of intellectual disability and relied on *Leland* instead. *Young*, 860 S.E.2d at 771-74.

And the Eleventh Circuit has rejected both an Eighth Amendment and a due process challenge to Georgia's more stringent standard of proof. *Hill v. Humphrey*, 662 F.3d 1335, 1360 (11th Cir. 2011) (en banc) (rejecting an Eighth Amendment challenge to Georgia's intellectual

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> jury should make such finding, it shall so specify in its verdict.

disability statute's reasonable doubt standard relying on *Leland*); *Raulerson v. Warden*, 928 F.3d 987, 1001-04 (11th Cir. 2019) (rejecting a due process challenge to Georgia's intellectual disability statute's reasonable doubt standard based on *Cooper* and relying on *Leland* instead). So, both the Georgia Supreme Court and the Eleventh Circuit have rejected due process attacks based on *Cooper* on Georgia's statute. If Georgia's higher standard of proof is not unconstitutional, as both the Georgia Supreme Court and the Eleventh Circuit have repeatedly held, then Florida's lower standard of proof certainly is not.

Accordingly, the trial court properly denied the motion to declare the intellectual disability statute unconstitutional.

Jury determination of intellectual disability

Walls asserts the postconviction court erred in denying his motion for a jury determination of the *Atkins* intellectual disability claim. IB at 51. Walls claims that he is entitled, under the Sixth Amendment right to a jury trial provision, to a jury determination of his *Atkins* claim rather than a determination by a judge, as provided for by

statute. The Sixth Amendment does not require any jury factfinding regarding mitigation, including intellectual disability. The postconviciton court properly denied the motion.

The postconviction court's ruling

On April 13, 2018, the defense filed a motion for a jury determination of the intellectual disability claim. (2022 Succ. PCR 514-522). In the motion, CCRC-M argued that intellectual disability was the functional equivalent of an element of the greater offense of capital murder, which under *Hurst v. Florida*, 577 U.S. 92 (2016), he was entitled to a jury determination of his intellectual abilities. Five days later, on April 18, 2018, the State filed a response to the motion for a jury determination of the *Atkins* claim arguing that the statute, rule, and Florida Supreme Court precedent all provide that the judge rather than a jury make the determination of intellectual ability. (2022 Succ. PCR 523-530). Months after the State filed its response to the motion, on July 11, 2018, CCRC-M filed declarations in support of the motion. (2022 Succ. PCR 535-545). On July 17, 2018, the postconviction court held an oral argument on the motion. On July

20, 2018, the postconviction court denied the motion for a jury determination. (2022 Succ. PCR 546-548). The postconviction court concluded both the applicable statute, § 921.137 and applicable rule of court, Florida Rule of Criminal Procedure 3.203(e), provided that the judge make the determinations of facts regarding *Aktins* claims. The postconviction court rejected the constitutional attack on the statute, relying on this Court's decision in *Oats v. Jones*, 220 So.3d 1127, 1130 (Fla. 2017).

Preservation

The issue of whether the Sixth Amendment right to a jury trial requires a jury determination of intellectual disability was properly preserved for appeal. Postconviction counsel objected on the same ground below in the trial court that they now raise as an issue on appeal and properly obtained a ruling from the trial court. § 924.051(3), Fla. Stat. (2022); *Sparre v. State*, 289 So.3d 839, 848 (Fla. 2019) (To preserve an issue for appellate review, a litigant must present the issue to the trial court in a timely, specific manner and obtain a ruling" citing *Corona v. State*, 64 So.3d 1232, 1242 (Fla. 2011),

and *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008)). Opposing counsel filed a motion raising this same issue in the lower court and obtained a ruling from the postconviction court. This issue is preserved.

Standard of review

The issue of whether the Sixth Amendment right to a jury trial requires the jury to make the factual determinations associated with an *Aktins* claim is a pure question of law which is reviewed de novo. *Cf. Plott v. State*, 148 So.3d 90, 93 (Fla. 2014) (reviewing a claim that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), required the jury, not the judge, made any factual findings supporting an upward departure sentence de novo); *Beckman v. State*, 230 So.3d 77, 94 (Fla. 3d DCA 2017) (stating that a claim of error under *Apprendi* raises a pure question of law subject to de novo review citing *Plott*). The constitutionality of a statute is also reviewed de novo. *State v. Catalano*, 104 So.3d 1069, 1075 (Fla. 2012) ("A court's decision regarding the constitutionality of a statute is reviewed de novo as it presents a pure question of law").

Dispositive threshold issue

The non-retroactivity of *Hall v. Florida*, 572 U.S. 701 (2014), under the current law of *Phillips* renders the entire issue of jury determination versus a judge determination, the functional equivalent of moot. Once a case is determined to be not retroactive the analysis ends and all of the associated issues, including the issue of the correct factfinder, should not be addressed. *Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1333 (11th Cir. 2019) (stating that "if a constitutional claim is *Teague*-barred, we do not reach its merits" citing *Beard v. Banks*, 542 U.S. 406, 410 n.2 (2004)). This Court should not address this issue.

Merits

Alternatively, on the merits, the intellectual disability statute, which permits the judge to determine intellectual disability, does not violate the Sixth Amendment right to a jury trial. The statute, rule of court, and this Court's precedent all provide that the judge rather than a jury make the determination of intellectual ability. § 921.137(4), Fla. Stat. (2022) (providing: "If the court finds, by clear and convincing evidence, that the defendant has an intellectual

disability as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination); Fla. R. Crim. P. 3.203(e); Fla. R. Crim. P. 3.203(g) (providing: "If, after the evidence presented, the court is of the opinion that the defendant is intellectually disabled, the court shall order the case to proceed without the death penalty as an issue).

This Court in *Oats v. Jones*, 220 So.3d 1127, 1130 (Fla. 2017), rejected a similar constitutional challenge to the statute based on *Hurst*. The *Oats* Court explained that intellectual disability is not a "necessary finding to impose a death sentence but is, rather, the opposite—a fact that bars death." *Id.* (citing *Hurst*, 202 So.3d at 67). Both concurring opinions agreed that Oats was not entitled to a jury determination of intellectual disability. *Oats*, 220 So.3d at 1131 (Pariente, J., concurring); *Oats*, 220 So.3d at 1131 (Lawson, J., concurring). Not a single Justice of the Florida Supreme Court thought that a capital defendant is entitled to a jury determination of intellectual disability. *See also Franqui v. State*, 301 So.3d 152, 156 (Fla.

2020) (rejecting a claim that *Hurst v. Florida* requires a jury determination of intellectual disability as "without merit" because both the applicable statute and the applicable rule of court provide that the determination "shall be made by a judge, not a jury" citing § 921.137, Fla. Stat. (2017), and Fla. R. Crim. P. 3.203(e)).

Additionally, this Court's more recent precedent of *State v. Poole*, 297 So.3d 487, 491 (Fla. 2020), supports the reasoning of *Oats*. This Court in *State v. Poole* held that the jury was constitutionally only required to unanimously find the existence of the statutory aggravating factors, not to find any of the mitigation or perform the weighing. Then, the United States Supreme Court agreed in *McKinney v. Arizona*, 140 S.Ct. 702 (2020). The *McKinney* Court explained that the single factual determination that a jury must make to impose a death sentence, under the Sixth Amendment, was a finding of one aggravating factor, not any of the mitigation or weighing. The United States Supreme Court explained that the Sixth Amendment right to a jury in a capital case is limited to a jury finding of a single aggravator. *Id.* at 705 (stating a "defendant convicted of murder is

eligible for a death sentence if at least one aggravating circumstance is found"); *id.* at 707 (stating that "a jury must find the aggravating circumstance that makes the defendant death eligible"); *id.* at 708 (stating that all that is required by the Sixth Amendment "is that the jury must find the existence of the fact that an aggravating factor existed"); *see also Betterman v. Montana*, 578 U.S. 437, 441 n.2 (2016) (stating that, in capital cases, eligibility for the death penalty "hinges on aggravating factor findings"). The jury is not required constitutionally to make any of the findings regarding additional aggravators, mitigation, or weighing according to both this Court in *Poole* and the United States Supreme Court in *McKinney*. All of those functions, beyond the finding of one aggravator, including findings regarding intellectual disability, may be made by the judge.

A jury is not required to make any determinations regarding mitigation under the Sixth Amendment including per se mitigation, such as age and intellectual disability. While intellectual disability is a species of per se mitigation, no mitigation, of any type, is required to be found by the jury. Mitigation is not an element because it is

proven by the defense, not the prosecution, and it is not required to be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363 (1970) (holding due process requires the prosecution to prove every element of a criminal offense beyond a reasonable doubt). Intellectual disability, however, is proven by the defense at the lower clear and convincing standard. Mitigation decreases, not increases, the sentence and therefore, the entire *Apprendi* line of cases, including *Hurst*, does not apply to mitigation. The Sixth Amendment does not require a jury determination of intellectual disability.

Opposing counsel relies on dicta in *Jones v. Mississippi*, 141 S.Ct. 1307 (2021), to argue for a jury determination. The United States Supreme Court in *Jones* held that their prior decision in *Miller v. Alabama*, 567 U.S. 460 (2012), did not mandate any particular factual finding; it only required that the sentencer take the mitigation of youth into account. The *Jones* Court did describe the "lack of intellectual disability" as a "eligibility criteria" that must be met before an offender can be sentenced to death. *Id.* at 1315. And, in a footnote, the *Jones* Court drew a parallel between a finding of incorrigibility and

an aggravating factor. *Id.* at 1316, n.3. The *Jones* Court observed that, if incorrigibility were a factual prerequisite to a life-without-parole sentence, the Sixth Amendment "might require that a jury, not a judge, make such a finding."

But that is because incorrigibility would increase the sentence to life and therefore, be akin to an element of the greater sentence of life. Again, mitigation does not increase the sentence. Intellectual disability does not increase the sentence and is proven by the defense. For that reason, any type of mitigation, including intellectual disability, cannot be an element or akin to one. *Jones* is not on point. *Jones* was about what fact had to be determined, not who had to determine those facts. And *Jones* certainly did not overrule or even mention *McKinney*.

The trial court properly denied the motion for a jury determination of the *Atkins* claim and properly made the factual determinations himself.

ISSUE III

WHETHER THERE IS COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE POSTCONVICTION COURT'S RULING THAT

WALLS FAILED TO PROVE TWO OF THE THREE PRONGS OF THE STATUTORY TEST FOR INTELLECTUAL DISABILITY? (Restated)

Walls is not intellectually disabled. As the postconviction court properly found, he fails the third prong of the statutory test for intellectual disability. Under the statute and this Court's precedent, the failure to establish all three prongs, means the *Atkins* claim fails. In Justice Canady's words, evidence shows that, as a juvenile, Walls had a normal IQ. *Walls v. State*, 213 So.3d 340, 349 (Fla. 2016) (Canady, J., dissenting). The evidence at the second evidentiary hearing again showed Walls' IQ as a teenager, even after his bout with viral meningitis, was normal. The average of his three IQ scores as a minor is 97. Walls' IQ as a minor was perfectly normal. The claim fails on the third prong alone. Walls is not intellectually disabled.

The postconviction court's ruling

The trial court denied the intellectual disability claim both on non-retroactivity grounds and on the merits, making findings regarding all three prongs of the statutory test for intellectual disability. (2022

Succ. PCR 6258-6279). The postconviction court ultimately denied the claim on both the first and third prongs. (2022 Succ. PCR 6276).

The trial court first addressed the first prong of significant subaverage intellectual functioning. (2022 Succ. PCR 6262-6263; 6264-6272). The trial court recounted Walls' various IQ scores as a minor: 1) at six years old, Walls had a full scale IQ of 88; 2) at seven years old, an average score (between 90 to 110); 3) at twelve years old, Walls had a full scale IQ of 102; 4) at fourteen-years-old, Walls had a full scale IQ of 101. (2022 Succ. PCR 6265-6266). The trial court also noted Walls IQ scores as an adult: at 24 years old, Walls had a full scale IQ of 72 and at 39 years old, Walls had a full scale IQ of 74. (2022 Succ. PCR 6268). The trial court found all of the scores as a minor to be valid and applied the statistical error of measurement (SEM) to these IQ scores and found that these scores "do not support a finding of subaverage intellectual functioning." (2022 Succ. PCR 6266). The trial court rejected the defense's reliance on achievement tests rather than IQ tests. (2022 Succ. PCR 6267). The trial court also rejected the defense's reliance on his placement in special classes

because the placement was due to his behavior rather than low intellectual ability. (2022 Succ. PCR 6267-6268). The postconviction court additionally rejected the defense's reliance on neurological testing rather than IQ testing. (2022 Succ. PCR 6270). The postconviction court then discussed Walls' two IQ scores as an adult: 72 and 74. (2022 Succ. PCR 6268). The postconviction court noted that this was a "remarkable drop" of 29 points from his prior IQ score of 101 as a fourteen-year-old raising the question of whether his adult scores were a "credible representation of his IQ." (2022 Succ. PCR 6268). The trial court noted that both the defense expert, Dr. Mills, and the State's expert, Dr. Prichard, testified that such a drop in IQ was "uncommon." (2022 Succ. PCR 6268). Dr. Prichard thought such a large drop in IQ scores was evidence of malingering, despite Walls having passed his test of memory malingering (TOMM). (2022 Succ. PCR 6269-6271 & n.61). The trial court concluded that because there was no evidence of significant brain trauma to account for the nearly 30-point drop, as well as Walls' conversational abilities in the recorded phone calls, made Dr. Prichard's testimony "credible." (2022 Succ.

PCR 6269 at n.61; 6272). Dr. Prichard, who had extensive experience evaluating persons for intellectual disability for over 25 years, relied on Walls' "strange" presentation during his interview with Walls on June 28, 2017, including Walls' talking like a baby as well as Walls' conversational abilities in the recorded phone calls, which, in his opinion were not consistent with intellectual disability. (2022 Succ. PCR 6270-6271). The trial court concluded that Walls had not established by clear and convincing evidence that he had significant subaverage intellectual functioning. (2022 Succ. PCR 6272).

The trial court found the State's expert, Dr. Prichard, to be the "most credible" on the matter. (2022 Succ. PCR 6272). Dr. Prichard diagnosed Walls with ADHD, conduct disorder, and antisocial personality disorder but not intellectual disability. (2022 Succ. PCR 6271 citing 2021 Evid. H. at 828-29).

The trial court then addressed the second prong of adaptive functioning as well, noting that the State's expert conclusion on the second prong were "inconclusive." (2022 Succ. PCR 6263-6264; 6273-6274). The trial court found that Walls satisfied the second prong but

that his adaptive deficits were not "severe." (2022 Succ. PCR 6258-6274).

The trial court then addressed the third prong of onset of the condition as a minor. (2022 Succ. PCR 6264; 6274-6276). The trial court found all of the IQ scores as a minor to be valid and applied the SEM to those IQ scores and found that those scores "do not support a finding of subaverage intellectual functioning." (2022 Succ. PCR 6266). The trial court found Walls had failed to show by clear and convincing evidence that his intellectual disability manifested itself prior to age 18. (2022 Succ. PCR 6275). The trial court noted that Walls "*consistently* obtained average IQ scores as a child." (2022 Succ. PCR 6275) (emphasis in original).

The trial court discussed Walls' bout with meningitis in 1979, when he was12 years old but then noted that Walls IQ score when he was 14 years old was 101, indicting that Walls was "unaffected by that illness." (2022 Succ. PCR 6275). The trial court, relying on Dr. Mills' testimony that generally "insults to the brain are evident within weeks to months and occasionally years" of the damage to find, that since

years had passed after the first two bouts of meningitis by the time of the IQ score of 101, yet Walls' IQ scores "remained consistently average," there was no evidence showing any of the incidents or health issues "affected" his intellectual functioning. (2022 Succ. PCR 6275-6276). The trial court found the evidence presented by the defense at the evidentiary hearing was "not of such a weight to produce a firm belief, without hesitation, that the condition manifested prior to age 18." (2022 Succ. PCR 6276). The trial court noted that, while Walls' behavior and performance in school was problematic, "his IQ remained average." (2022 Succ. PCR 6275).

The trial court concluded that Walls had failed to show either the first prong or the third prong by "clear and convincing evidence," as required by the statute. (2022 Succ. PCR 6276; 6262 at n.12). The trial court denied the claim of intellectual disability on the first and third prongs. (2022 Succ. PCR 6276; 6277).

Standard of review

A trial court's factual findings on the three prongs of the statutory test and the credibility of the experts are reviewed for competent,

substantial evidence, also known as clear error review. *Cannon v. State*, 310 So.3d 1259, 1264 (Fla. 2020) (explaining that where the postconviction court has conducted an evidentiary hearing, the appellate court will defer to the factual findings of the postconviction court if supported by competent, substantial evidence); *Dailey v. State*, 283 So.3d 782, 788 (Fla. 2019) (explaining that when the lower court has ruled on a claim following an evidentiary hearing, the appellate court reviews "the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence" citing *Green v. State*, 975 So.2d 1090, 1100 (Fla. 2008)). For a trial court's factual and credibility findings to be clearly erroneous, they must strike the appellate court not merely as wrong but as wrong with "the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988); *People v. Cheatham*, 551 N.W.2d 355, 368, n.23 (Mich. 1996) (quoting *Parts & Elec. Motors, Inc.*); *Cox Enterprises, Inc. v. News-Journal Corp.*, 794 F.3d 1259, 1272, n.92 (11th Cir. 2015); *United*

States v. Miller, __ F.4th __, 2021 WL 8651030, at *6 (D.C. Cir. May 31, 2021) (quoting *Parts & Elec. Motors, Inc.*).

Merits

The evidence at the second evidentiary hearing again showed Walls' IQ as a minor, even after his bout with viral meningitis, was normal. The average of his three IQ scores as a minor is 97. The claim fails on the third prong alone. Walls is not intellectually disabled.

Statutory test for intellectual disability

Florida has a statutory definition of intellectual disability for capital cases. The "Imposition of the death sentence upon an intellectually disabled defendant prohibited" statute, section 921.137(1), Florida Statute (2021), provides:

> As used in this section, the term "intellectually disabled" or "intellectual disability" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and

> community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

Florida's statutory definition of intellectual disability was derived from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV), which was a standard clinical definition in 2001 when the statute was first adopted by the Florida legislature, before *Atkins* had even been decided. *Atkins*, 536 U.S. at 308 n.3 (reciting the definition of intellectual disability in the DSM-IV published in 2000). *Hall v. Florida* did not alter Florida's statutory test for intellectual disability in any manner.

Under the statute, a claim of intellectual disability requires the defendant to establish three prongs: 1) significantly subaverage general intellectual functioning; 2) concurrent deficits in adaptive behavior; ***and*** 3) manifestation of the condition before age eighteen. § 921.137(1), Fla. Stat. (2022); *see also* Fla. R. Crim. P. 3.203(b); *Franqui v. State*, 301 So.3d 152, 154 (Fla. 2020); *Salazar v. State*, 188 So.3d 799, 811 (Fla. 2016).

The failure of proof on any one of the three prongs means the *Atkins* claim fails. As this Court recently stated, if the defendant fails to prove any one of the three components of the statutory test for intellectual disability, the defendant will not be found to be intellectually disabled. *Nixon*, 327 So.3d at 782; *see also Foster v. State*, 260 So.3d 174, 179 n.7 (Fla. 2018) (explaining that this Court has "clarified" that "a failure to prove any one prong of the intellectual disability testis a failure to prove the claim" citing *Quince v. State*, 241 So.3d 58, 62 (Fla. 2018), and *Williams v. State*, 226 So.3d 758, 773 (Fla. 2017)). Resolution of intellectual disability claims on one prong alone is proper in federal court as well. The Eleventh Circuit recently resolved an intellectual disability claim based solely on the third prong. *Raulerson v. Warden*, 928 F.3d 987, 1008 (11th Cir. 2019), *cert. denied*, 140 S.Ct. 2568 (2020).

Averaging multiple IQ scores

Multiple IQ scores should be considered collectively. *Hall*, 572 U.S. at 742 (Alito, J., dissenting) (noting the "well-accepted view is that multiple consistent scores establish a much higher degree of confidence"); *Moore v. Texas*, 137 S.Ct. 1039, 1060 n.1 (2017) (Roberts,

C.J., dissenting) (noting *Hall v. Florida* reached "no holding as to the evaluation of IQ when an *Atkins* claimant presents multiple scores, noting only that 'the analysis of multiple IQ scores jointly is a complicated endeavor'" and *Hall* cannot be read to call into question the approach of states that would not treat a single IQ score as dispositive when there are "additional" higher IQ scores). The *Hall* majority did not disagree. *Hall*, 572 U.S. at 714 (stating that the "analysis of multiple IQ scores jointly is a complicated endeavor" citing Schneider, *Principles of Assessment of Aptitude and Achievement*, in The Oxford Handbook of Child Psychological Assessment 286, 289-91, 318 (D. Saklofske, C. Reynolds, V. Schwean, eds. 2013)). So, both the *Hall* majority and the dissents agree that IQ scores should be considered collectively.

The most common method for considering scores measuring the same phenomena collectively is an average or mean. And while means and medians are the typical methods of considering multiple scores collectively, another method of considering IQ scores collectively, referred to by the *Hall* majority, is a "composite" score. *Hall v. Florida*, 572 U.S. at 714 (citing to Schneider, *Principles of Assessment of Aptitude*

and Achievement at 289-91). Schneider has a complicated formula for determining the "composite" score. But he acknowledges that an average is a "rough approximation of a composite score," and only advocates the use of a "composite" score in cases of low and high scorers. *Principles* at 290. But Schneider does not explain why using the median instead of a mean does not accomplish much the same goal even in the case of low scores. Regardless of the particular method, IQ scores should be considered collectively.

Neither of the current manuals, the AAIDD-11 user's guide or the DSM-V manual takes a position on considering multiple IQ scores collectively or endorses a particular method or formula for doing so. But neither the user's guide or manual specifically condemn the use of averages.

Opposing counsel bases her argument that averages should not be used on standard clinical practice among psychologists of not considering IQ scores collectively.[6] Even if it is standard clinical

[6] It is not clear that it is truly standard clinical practice not to use an average. The State's intellectual disability expert in *Wright v. Sec'y, Fla. Dep't of Corr.*, 2021 WL 5293405, *8 (11th Cir. Nov. 15, 2021), used an average. *Wright* involved nine different IQ tests the defendant

practice among psychologists not to average multiple IQ scores, it certainly is standard practice among mathematicians to consider all types of scores measuring the same phenomena collectively and to use means and medians to do so. Mathematicians are the true experts when it comes to numbers and how numbers should be considered collectively, not psychologists. Indeed, part of the *Hall* Court's reason for mandating the use of SEM to adjust single IQ scores was that SEM was commonly employed in other contexts by other professionals. *Hall*, 572 U.S. at 722 (observing observed that the "SEM is not a concept peculiar to the psychiatric profession and IQ tests," rather, it "is a measure that is recognized and relied upon by those who create and devise tests of all sorts"). The Capital Defense Bar may not invoke standard mathematical practice only when it suits them. Using

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had taken as both a child and an adult, six of which were valid and used in determining the first prong, and those six scores were between 75 and 82. *Wright*, 2021 WL 5293405 at *4. The State's expert, Dr. Gamache, had used an average of the six valid scores to obtain an IQ score for the first prong, relying on a manual that advocated averaging multiple IQ scores. So, some psychologists do use averages.

means and medians is standard math and should be used with IQ scores as well.[7]

Courts also use the average of multiple IQ scores when addressing *Atkins* claims. *See e.g., Clemons v. Comm'r, Ala. Dep't of Corr.*, 967 F.3d 1231, 1249 (11th Cir. 2020) (using an average of four IQ scores to determine that the defendant's IQ was 70.25), *cert. denied*, *Clemons v. Dunn*, 141 S.Ct. 2722 (2021) (No 20-1197). Averaging IQ scores is perfectly proper. The average of Walls' three IQ scores as a minor is 97.

Third prong of onset as a minor

As Justice Canady observed, this case is "easily resolvable" on the merits based on the third prong alone. *Walls*, 213 So.3d at 349 (Canady, J., dissenting). Walls had three IQ scores as a minor which

[7] Averaging accomplishes the same goal of estimating the actual IQ that a SEM does and indeed, an average of multiple scores is the better method for doing so. Below in the trial court, opposing counsel insisted on adjusting the averages the State employed by the SEM. But there is no rationale for adjusting an average for the SEM. Adjusting an IQ score for the SEM should be limited to situations involving a single IQ score. When an average is used, the SEM is not necessary and should not be used.

were 88, 102, and 101. Not a single one of these scores is a qualifying score under *Hall v. Florida* or *Moore v. Texas*.

Furthermore, the average of Walls' three IQ scores as a minor, 88, 102, 101, is 97. Walls had an IQ of 97 as a minor. An IQ of 97 reflects normal intelligence. Walls' average IQ score of 97 as a minor negates his entire *Atkins* claim on the merits.

The speculative testimony presented at the second evidentiary hearing regarding a possible but undocumented reoccurrence of viral meningitis does not begin to rebut these three undisputed IQ scores at any standard of proof. Dr. Prichard noted that Walls' IQ score of 101 was in 1983, which was years after his only diagnosed bout of meningitis in November of 1979. (T. 920). Walls was hospitalized with viral meningitis when he was 12 years old but two years later, when he was 14 years old he scored 101 on an IQ test. The possible reoccurrence of meningitis was never verified medically at the time. And, even if Walls did indeed have a less severe reoccurrence of meningitis, that did not even require hospitalization, there is no hard evidence that the reoccurrence effected his IQ in any manner. Such

sheer speculation would not even meet the preponderance standard of proof. *Calhoun v. State*, 312 So.3d 826, 848 (Fla. 2019) (stating that postconviction claims based on "mere speculation and conjecture do not warrant relief"); *Gonzalez v. State*, 253 So.3d 526, 528 (Fla. 2018) (stating that mere speculation is not sufficient to form the basis for postconviction relief citing *Ellerbee v. State*, 232 So.3d 909, 918 (Fla. 2017), and *Derrick v. State*, 983 So.2d 443, 462 (Fla. 2008)); *Maharaj v. State*, 778 So.2d 944, 951 (Fla. 2000) (stating that postconviction relief "cannot be based on speculation or possibility").

The Pennsylvania Supreme Court has explained that the third prong, the onset prong, is often the most reliable evidence of intellectual disability because it is generated at a time when there is no incentive to slant the evidence. *Commonwealth v. Hackett*, 99 A.3d 11, 33 (Penn. 2014) (noting capital defendants have a "powerful incentive to malinger and to slant evidence" after *Atkins*). The Fifth Circuit agrees that a capital defendant's IQ scores as a minor are more reliable. *Woods v. Quarterman*, 493 F.3d 580, 587 (5th Cir. 2007) (noting the testimony that the childhood IQ scores are more reliable

because the more recent but lower IQ scores could have been a "result of a motivation to score poorly" and affirming the denial of an intellectual disability claim based on IQ scores as a child of 78 and 80). While a child taking an IQ test can certainly be disinterested or distracted, a child does not have the same incentive to perform poorly as an adult defendant facing the death penalty does. As Justice Scalia observed, a "capital defendant who feigns mental retardation risks nothing at all." *Atkins*, 536 U.S. at 353 (Scalia, J., dissenting). The third prong, when it involves IQ scores from childhood, is the most objective and reliable of the three prongs, because malingering is rarely at issue with that prong. The *Atkins* claim fails on the third prong alone.[8]

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[8] Because Walls failed the third prong at any standard of proof, the State declines to fully address the other two prongs. The State will, however, briefly address the first prong. Walls fails the first prong as well, as the trial court found. The dispute regard the first prong is the trial court's finding the State's expert more credible regarding the first prong and malingering. But even ignoring malingering, Walls still fails the first prong. The average of Walls' two IQ scores as an adult is 73. It is only when the average is "at or below 70," that the other two prongs matter under *Moore v. Texas*, 137 S.Ct. at 1049. Walls must show an average IQ as an adult that is under 71 to establish the first prong of significantly subaverage intellectual functioning after being granted a full evidentiary hearing and being allowed to make a full

Walls' claim fails on the merits, as the trial court found. Walls is not intellectually disabled.

Accordingly, the trial court's order denying the intellectual disability claim, following the second evidentiary hearing, should be affirmed.[9]

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evidentiary presentation regarding the first prong. All *Hall* and *Moore* entitled a capital defendant to was an evidentiary hearing at which he can make a full evidentiary presentation—nothing more. But at the evidentiary hearing, the most Walls established was borderline intellectual functioning, not "significantly" subaverage intellectual functioning, as required by the statute. Merely establishing a low IQ of 73 is not sufficient to establish the first prong. *Atkins*, 536 U.S. at 317 (noting that not all people who claim to be intellectually disabled will be "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus" against executing). Capital defendants who fall in the borderline range are not protected by *Atkins*. Walls fails the first prong even without any consideration of his possible malingering.

[9] The State objects to opposing counsel's repeated improper attempts to incorporate by reference pleadings the defense filed in the trial court into the appellate brief to evade the 75 page limit. IB at 39 (attempting to incorporate 101 pages of the written closing argument); IB at 61, n.22 & n.23 (making a Flynn Effect argument based on arguments made below). Incorporation by reference is improper. *Mendoza v. State*, 87 So.3d 644, 663, n.16 (Fla. 2011) (noting the rules of appellate procedure prohibit the practice of incorporation by reference citing Fla. R. App. P. 9.210(b)(5)); *Wright v. State*, 19 So.3d 277, 297, n.19 (Fla. 2009). Incorporation by reference into an appellate brief "makes a mockery" of page limitations. *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1167 n.4

(11th Cir. 2004). This Court should not consider any of that material or any such arguments.

If this Court does consider the incorporated arguments made in the initial brief, the State requests that this Court also consider the State's pleading below as well. For one example, what opposing counsel refers to as norm obsolescence in footnote 22, is commonly known as the Flynn effect and the State wrote extensively on that topic below. *Haliburton v. State*, 331 So.3d 640, 647-48 (Fla. 2021) (stating that "this Court previously observed that there is no requirement that the Flynn effect be applied to IQ scores in intellectual disability cases citing *Quince v. State*, 241 So.3d 58, 61 (Fla. 2018)).

CONCLUSION

The State respectfully requests that this Honorable Court affirm the denial of intellectual disability claim.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

/s/ Charmaine Millsaps
CHARMAINE M. MILLSAPS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE
primary email:
capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com

COUNSEL FOR THE STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing AMENDED ANSWER BRIEF has been furnished via e-portal to KARA RENEE OTTERVANGER, Assistant Federal Defender, 12973 N. Telecom Pkwy., Temple Terrace, FL33637-0907; phone: (813) 558-1600; email: kara_ottervanger@fd.org; and JULISSA R.FONTAN, Assistant Capital Collateral Regional Counsel - Middle, 12973 N.Telecom Pkwy., Temple Terrace, FL 33637-0907; phone: (813) 558-1600; email: fontan@ccmr.state.fl.us this 1st day of June, 2022.

/s/ Charmaine Millsaps
Charmaine M. Millsaps
Attorney for the State of Florida

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Counsel certifies that this brief was generated using Bookman Old Style 14-point font.

/s/ Charmaine Millsaps
Charmaine M. Millsaps
Attorney for the State of Florida