IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22-72
LOWER COURT CASE NO. 87-CF-856

FRANK ATHEN WALLS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE[1]

Frank Athen Walls was convicted of two counts of capital murder and sentenced to death on one count. This Court reversed the judgment due to State-sponsored "illegal subterfuge" in eliciting incriminating information from Mr. Walls, which tainted his pre-trial competency hearing. *Walls v. State,* 580 So. 2d 131, 133 (Fla. 1991). It ordered that "any further psychiatric or psychological evaluations … shall not rely to any degree, directly or indirectly, on the information obtained [from the subterfuge]." *Id.* at 135. On retrial, Mr. Walls was again convicted and sentenced to death, and this Court affirmed. *Walls v. State*, 641 So. 2d 381, 391 (Fla. 1994).

After *Atkins v. Virginia*, 536 U.S. 304 (2002), Mr. Walls filed an intellectual disability (ID) claim in his initial postconviction proceedings, which this Court denied because he did not present a measured IQ score below 70, as required by then-existing precedent. *See Walls v. State*, 3 So. 3d 1248 (Fla. 2008) (citing *Cherry v. State*, 959 So. 2d 702 (Fla. 2007)). Mr. Walls renewed his ID claim after *Hall v. Florida*, 572 U.S. 701, 704 (2014) (holding *Cherry*'s strict cut-off of

[1] References to the record on appeal are designated as "R. #" for court filings and "T. #" for transcript of proceedings.

70 unconstitutional). This Court ordered the circuit court to hold an evidentiary hearing and adjudicate the ID claim on the merits consistent with *Hall*. *Walls v. State*, 213 So. 3d 340, 347 (Fla. 2016).[2] This Court held that *Hall* applies retroactively because *Hall* limited "the power to impose a certain sentence – the sentence of death for individuals within a broader range of IQ scores than before." *Id.* at 346. The State did not seek certiorari review of this Court's *Hall* retroactivity ruling. *See* 2017 WL 2665654 (petition raising other issues); *Florida v. Walls*, 138 S. Ct. 165 (2017) (denying certiorari).

On remand in the circuit court, Mr. Walls unsuccessfully moved for a jury determination of his ID claim, R. 546-48; for a finding that Florida's clear and convincing standard of proof for ID claims is unconstitutional, R. 1036-40; and for a finding that the statutory requirement of onset before age 18 is unconstitutional, R. 6274-75. Following this Court's decision in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), which overruled its 2016 holding in Mr. Walls' case that *Hall* is retroactive, the State moved for a summary denial of Mr. Walls' ID claim on non-retroactivity grounds. R. 3560-76. The circuit court

[2] The State's rehearing motion was denied on January 9, 2017, and this Court issued its mandate on January 25, 2017.

rejected the State's motion, reasoning that despite the *Phillips* holding as to *Hall* generally, this Court's final judgment and mandate prohibited using the unconstitutional pre-*Hall* cutoff against Mr. Walls on remand. R. 3784-89 (citing *State v. Okafor*, 306 So. 3d 930 (Fla. 2020)).

The circuit court held an evidentiary hearing on the matter in June and July 2021. After the *voir dire* of the State's expert, Mr. Walls unsuccessfully moved to strike his testimony on the grounds that he relied on illegally obtained evidence, in violation of this Court's 1991 directive. R. 6012-16.

After the hearing, the circuit court denied relief on two grounds. Relying on this Court's intervening decision in *Nixon v. State*, 327 So. 3d 780 (Fla. 2021), the circuit court ruled that Mr. Walls' ID claim was barred on non-retroactivity grounds, despite this Court's 2017 mandate to the contrary and the circuit court's own ruling in February of 2021 that the 2017 mandate must be followed. R. 6277. On the merits, the court ruled that Mr. Walls could not prove by clear and convincing evidence prongs one and three. R. 6276. The circuit court denied Mr. Walls' timely rehearing motion. R. 6324-26.

STATEMENT OF THE FACTS

At the 2021 hearing, Mr. Walls presented seven witnesses in support of his ID claim. Drs. Mark Cunningham, Daniel Martell, and Karen Hagerott personally evaluated Mr. Walls and concluded that he was intellectually disabled. Dr. Mark Mills reviewed their work, plus historical social and medical records relevant to onset, and concurred. Dr. Robert Ouaou testified about the science of brain development and brain injuries, and Dr. Barry Crown, who sat in on the State's expert's evaluation of Mr. Walls, testified as a rebuttal witness. Mr. Walls also presented testimony from his 1992 trial counsel, James Sewell. The State presented Gregory Prichard, Psy.D, who reviewed historical social and medical records and met with Mr. Walls for less than two hours, T. 1114, and did not administer any IQ tests. He opined that Mr. Walls was of altogether average intelligence and feigning his disability.

In 1991, Mr. Walls obtained a full-scale IQ score of 72 on the WAIS-R test. T. 350-51, 528, 538, 910, 1153. In 2006, he obtained a full-scale IQ score of 74 on the WAIS-III. T. 352, 384. All experts agreed those scores qualify as significantly subaverage intellectual functioning. T. 372, 419, 1152-53.

Mr. Walls' true scores may have been lower. Dr. Cunningham testified that interpreting the scores requires considering the standard error of measurement (SEM) of approximately 5 points, T. 354-67, and that the scores were products of outdated norms that should be adjusted to reflect Mr. Walls' true position within the population at the time of the administration, T. 958-61. Separately, he explained that the WAIS-R (and to a lesser degree WAIS-III) had errors in the sampling of the lower-end tail of their population, T. 364-66, which also required corresponding corrections, T. 367-71. Correcting for outdated norms and sampling errors, Dr. Cunningham testified Mr. Walls 2006 IQ score was truly a 68 and his 1991 score was approximately 62-63. T. 370-71.

Dr. Prichard did not dispute any of the sampling-error testimony. As to the norm obsolescence, he agreed that it was a real phenomenon, and agreed with the rate of intelligence increase within the population, but disagreed about the propriety of correcting scores in legal cases. T. 1093-95.

Mr. Walls also presented expert testimony confirming that his IQ scores were valid because they were the products of good effort. Experts noted the consistency among Mr. Walls' scores despite being

fifteen years apart and on different instruments; his successful passing of malingering measures such as the Test of Memory Malingering (TOMM), the Reliable Digit Span, and the Wechsler Memory Scale; and that the experts' general clinical judgment and improvised malingering devices revealed authentic presentation and good effort. T. 402-12, 529-535.

Dr. Prichard testified that, based on his clinical judgment during his interview, Mr. Walls was being difficult and not giving good effort. He further opined, based on this meeting, that Mr. Walls gave inadequate effort on the IQ tests, resulting in scores in the ID range.

Mr. Walls' childhood IQ scores, 88, 104, and 102, were in the average and low-average range of intellectual functioning. Mr. Walls' experts testified that the unusual split in verbal and performance scores on those tests could indicate early brain dysfunction. T. 506-09, 1152-53. Mr. Walls also presented testimony of a medical doctor, corroborated by voluminous historical records, explaining that Mr. Walls' intellectual functioning declined sometime in his later adolescence, as a result of a confluence of medical and other "insults," including numerous childhood bouts of meningitis, other infections, elevated fevers, and blows to the head. T. 838-46, 872-78,

910-11 (Dr. Mills); *see also* T. 940-50 (Dr. Ouaou). Dr. Mills opined that repeated insults can be as catastrophic as one major injury. T. 872.

Dr. Prichard noted that an IQ decline of Mr. Walls' magnitude was uncommon, T. 1096, but conceded that diseases such a meningitis can attack the brain and lead to ID, T. 1150-51, 1165. He also conceded that because he was not a medical doctor, he could not speak in detail on such etiology. T. 1186. He agreed that nothing in the jail records (after Mr. Walls' arrest at age 19) suggested a possible post-developmental event to explain a later drop in measured intelligence. T. 1156.

Besides the IQ scores, Mr. Walls presented expert testimony about the relevance of neuropsychological testing to assessing intellectual functioning. T. 389-94. A neuropsychological battery administered in 1984 (when Mr. Walls was 16) revealed that his intelligence at that age was consistent with onset of intellectual disability. T. 512-14, 389-94; R. 4803-07. He was also administered a similar neuropsychological battery in 1992, in connection with his trial, producing consistent results. T 595-97, 514-15; R. 5121-25.

Finally, Mr. Walls presented uncontradicted testimony, and educational, medical, and other records, documenting severe and significant adaptive deficits during childhood and adolescence in all three recognized sub-domains – conceptual, social, and practical. Dr. Prichard accepted and the court ultimately found that Mr. Walls has adaptive deficits. *See* R. 6041-54 (summarizing the record).

SUMMARY OF ARGUMENT

This Court should reverse the circuit court's non-retroactivity-based denial of Mr. Walls intellectual disability claim. This Court's 2017 mandate required a *Hall*-compliant merits hearing and decision in Mr. Walls' case because *Hall* substantively expanded the class of individuals who may qualify as intellectually disabled under the Eighth Amendment. Not even four years later, in a separate case, this Court overruled that decision and held that *Hall* was a new criminal procedure rule that was not retroactively applicable. That new ruling – issued without briefing or even notice to the parties in the case – violated the United States Constitution. This Court should again hold that *Hall* must be applied to every person claiming intellectual disability in Florida. Even if the Court finds that *Hall* is not retroactive in all post-conviction cases, it should still apply *Hall* to Mr. Walls' ID

claim because the Court's prior mandate guaranteeing the application of *Hall* is long final and Mr. Walls has detrimentally relied on it. A non-retroactivity denial here would violate state procedural law and Mr. Walls' federal constitutional right to due process.

The circuit court's procedural errors also call for reversal. The circuit court erred in failing to strike the State's expert after he admitted to relying on statements obtained in violation of Mr. Walls' constitutional rights. This Court previously considered these very statements to be fruit of the poisonous tree and forbade future experts from relying on them to any degree in future proceedings.

The circuit court further erred in declining to permit Mr. Walls to have his ID claim determined by a death-qualified jury, and in requiring him to prove his intellectual disability by clear and convincing evidence, a requirement that violates the due process clause of the Fourteenth Amendment because a State has no power to decide as a matter of policy preference the burden for federal constitutional violations.

The circuit court also erred in refusing to consider neuropsychological test results and other performance measures during Mr. Walls' childhood, in addition to IQ scores, when ruling on

whether Mr. Walls meets prong one. The circuit court's refusal to do so is out of sync with prevailing scientific norms and accordingly is unconstitutional. The circuit court similarly erred in refusing to consider a valid IQ test score Mr. Walls obtained at age 23 as being obtained "in the developmental period," in order to meet prong three, instead adhering to a strict cut-off of 18 as the age of onset. Florida's cut-off of 18 as the age of onset is inconsistent with clinical understanding of brain development and as such is unconstitutional.

To the extent that the circuit court was bound by Florida statutes in reaching these conclusions, this Court should find that the governing statutes and rules of criminal procedure are unconstitutional and either remand for a review by the circuit court under constitutional standards or grant Mr. Walls relief.

On the merits, Mr. Walls is entitled to relief because he has proven all three prongs of intellectual disability. He has two valid IQ scores – reinforced by neuropsychological batteries predating and post-dating the IQ scores – that fall into the range of significantly subaverage general intellectual functioning, satisfying the first prong of the diagnosis. Mr. Walls has significant adaptive deficits, as the circuit court found, and thus "satisfies the second prong of the test

for intellectual disability." R. 6274. Finally, Mr. Walls satisfies the third (developmental onset) prong because his IQ score drop – which occurred between early adolescence and early adulthood – is overwhelmingly shown to have happened before he turned 18.

The circuit court's ruling that Mr. Walls did not prove prong 1 and 3 by clear and convincing evidence was based on one underlying insinuation: that it was at least likely enough that Mr. Walls malingered his otherwise-valid IQ scores (at ages 23 and 36). The record shows that the notion of malingering these scores is too outlandish to undermine the otherwise clear and convincing proof.

STANDARD OF REVIEW

All questions of law, including whether Mr. Walls has established the three prongs of the ID test, are reviewed *de novo* on appeal. *State v. Herring*, 76 So. 3d 891, 894 (Fla. 2011). Pure questions of fact are reviewed under the "competent and substantial evidence" standard. *Allen v. State*, 261 So. 3d 1255, 1269 (Fla. 2019).

ARGUMENT

I. THE CIRCUIT COURT WRONGLY DENIED MR. WALLS' *ATKINS* CLAIM ON NON-RETROACTIVITY GROUNDS.

a. *Hall* applies to all *Atkins* claims.

This Court correctly ruled in *Walls*, 213 So. 3d at 346, that *Hall* must be retroactively applied to all *Atkins* cases. *Hall* qualified and expanded the class of individuals who may not be executed. This ruling was sufficient for *Hall* retroactivity under state law, *id.* (citing *Witt v. State*, 387 So.2d 922 (Fla. 1980)), and is required by the federal retroactivity floor set by *Teague v. Lane,* 489 U.S. 288 (1989).[3]

Hall is retroactive because it qualified and expanded the class of persons exempt from execution. *Atkins*, as previously understood by this Court, only covered a sub-group among the intellectually disabled. To qualify for protection, a person must be "so impaired as to fall within the range of mentally retarded offenders *about whom there is a national consensus*." *Atkins*, 536 U.S. at 317 (emphasis

[3] *Walls'* expansion-of-protected-class arguments for retroactivity below were rooted in federal retroactivity law for "substantive" new rules, which was not affected by *Teague*'s limits for retroactivity of new procedural rules. *Compare id.* at 346 (citing *Stovall v. Denno*, 388 U.S. 293, 297 (1967) and *Linkletter v. Walker*, 381 U.S. 618, 636 (1965)), with *Teague,* 489 U.S. at 307-08; *see also Edwards v. Vannoy,* 141 S. Ct. 1547, 1571 (2021) (Gorsuch, J., concurring).

added). This sentence meant that less-impaired persons might not be protected if their impairment falls short of the "national consensus," even if they are also in the "range of mentally retarded offenders." *Id.*[4]

In *Hall*, the Supreme Court revisited the consensus and refined its definition of who is "so impaired … within the range of mentally retarded offenders," 572 U.S. at 719, to include a broader set of IQ scores, i.e. those scores within the +/- 5 SEM. As required by Eighth Amendment precedent, the Court surveyed "the legislative policies of various States, and the holdings of state courts" for the existence of "consensus" as to IQ score minimums. *Id.* at 709. The Court explained that national surveying was doctrinally necessary because "[t]his calculation provides 'objective indicia of society's standards' in the context of the Eighth Amendment." *Id.* at 714 (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)). The Court concluded that both the "aggregate number[]" of state laws, and the "[c]onsistency of the direction of change" informed its "determination of consensus" that

[4] In a later case, the Court again relied on this sentence to reiterate that *Atkins* "did not provide definitive … substantive guides for determining when a person … 'will be so impaired as to fall [within *Atkins'* compass]." *Bobby v. Bies*, 556 U.S. 825, 831 (2009) (last alteration in original). *Cf.* A. Scalia & B. Gardner, Reading Law, at 107 (explaining negative implication).

imposing a cutoff at 70 was cruel and unusual. *Id.* at 717. The Court thus concluded that "our society does not regard this strict cutoff as proper or humane." *Id.* at 718. Having found the consensus, the Court moved on to the next doctrinal step in the Eighth Amendment inquiry: its own judgment. *Id.* at 721 (quoting *Roper,* 543 U.S. at 564, and *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality op.)). Applying its "independent judgment," *id.* at 721-23, the Court affirmed the consensus and held Florida's cutoff unconstitutional.

The doctrinal method the Court used to arrive at the *Hall* rule proves that *Hall* was a substantive decision, *i.e.*, a decision as to the scope of the class of defendants who are not death-eligible due to "society's standards" of decency. *See id.* at 714; *Jones v. Mississippi,* 141 S. Ct. 1307, 1315 (2021) (noting this method as being reserved for establishing substantive Eighth Amendment eligibility criteria) (citing *Graham,* 560 U.S. at 61, and *Roper,* 543 U.S. at 563).[5] This

[5] *Hall* pointed to similar national surveying used to make substantive rules in *Atkins*, *Roper*, and *Coker*. Every other substantive Eighth Amendment rule was also decided through this prescribed method. *See, e.g., Graham v. Florida*, 560 U.S. 48, 60–61 (2010) (juvenile nonhomicide LWOP); *Kennedy v. Louisiana*, 554 U.S. 407, 422 (2008) (rape of a young child); *Thompson v. Oklahoma*, 487 U.S. 815, 852 (death penalty for juveniles under age 16); *Enmund v. Florida*, 458 U.S. 782 (1982) (low culpability co-defendants).

method is not employed when deciding procedural rules, even under the Eighth Amendment.[6] The *Hall* rule was necessarily substantive because it was derived from the doctrinal method used only for deciding what punishments offend "'objective indicia of society's standards.'" *Id.* at 714 (quoting *Roper*, 543 U.S. at 563).

Hall substantively expanded *Atkins* protection, even if it did so modestly and without guaranteeing relief to any particular defendant. The Supreme Court has twice made modest incremental changes to substantive prohibitions, and their size did not affect their substantive nature. *See Kennedy*, 554 U.S. at 422 (expanding on *Coker* to cover rape of a younger child), *Roper*, 543 U.S. at 561 (expanding on *Thompson* to cover juveniles ages 16 and 17). Similarly, in *Montgomery v. Louisiana*, 577 U.S. 190 (2016), the Supreme Court held *Miller v. Alabama*, 567 U.S. 460 (2012) to be substantive and retroactive, even though *Miller* only barred *automatic*

[6] Procedural rules, by their nature, do not implicate moral judgments of decency. The Court thus never looks to state laws and practices when deciding on procedural or technical Eighth Amendment rules. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 602-605 (1978) (exclusion of relevant evidence); *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (validity of aggravating factors); *Pulley v. Harris*, 465 U.S. 37, 47-50 (1984) (necessity of proportionality review mechanisms); *Booth v. Maryland*, 482 U.S. 496, 509 (1987) (victim impact admissibility).

juvenile life-without-parole sentences. The Court reasoned that *Miller* rendered life-without-parole (LWOP) "an unconstitutional penalty for a class of defendants because of their status" as juvenile offenders whose crimes reflect the transient immaturity of youth, and therefore announced a new substantive rule that is retroactive on collateral review. 577 U.S. at 206, 208 (quoting *Penry v. Lynaugh,* 492 U.S. 302, 330 (1989)).

Montgomery specifically rejected the argument that the *Miller* rule was procedural, even though *Miller* required procedures to implement its substantive holding. *Id.* at 208. It is often necessary for a substantive change to be accompanied by a procedure "that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish." *Id.* at 735, *citing Mackey v. U.S.*, 401 U.S. 667 (1971) (Harlan, J., concurring). Otherwise, there would be no way for a defendant to show that he belongs to the protected class that the Constitution prohibits a particular form of punishment from being imposed upon. *Montgomery*, 577 U.S. at 210. "Those procedural requirements, of course, do not transform substantive rules into procedural ones." *Id.*

Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, it found life in prison disproportionate for all but the rarest of children and set a procedure for determining which children would fall into that category. *Id.* After *Miller*, only juveniles whose "crimes reflect irreparable corruption," *id.* at 208-09, can be sentenced to LWOP. The procedure used to make that categorization was necessary to implement *Miller* and did not make its substantive guarantee non-retroactive. Where, as in *Miller*, the holding announces procedural requirements necessary to implement a substantive guarantee that expands a protected class, the rule itself is still substantive and retroactive. *Id.* at 209-11.

Similarly, *Hall* did not foreclose that someone like Mr. Walls *could* be sentenced to death, but it expanded the category of individuals who would be exempt from that disproportionate sentence and provided a procedure for determining which capital defendants fell into that expanded category. Before *Hall*, in Florida, all capital defendants with an IQ over 70 could be executed. After *Hall*, only those capital defendants with IQs over 75 can be executed.

If there is any doubt about the substantive nature of the *Hall* rule, this Court can look to the fact that the Supreme Court has itself,

implicitly, suggested that it warrants retroactive application. Mr. Hall's sentence was already long final when the Supreme Court reviewed it following a successive postconviction proceeding. This means that before the Court could grant him relief it had to be sure, "as a threshold matter," that doing so would not create a new non-retroactive rule. *See Penry,* 492 U.S. at 313.

But there is more than just granting relief in *Hall.* The Supreme Court again granted relief in *Moore v. Texas*, 137 S. Ct. 1039 (2017), confirming that the *Hall* is retroactive. The defendant in *Moore* – like Mr. Walls and Mr. Hall – was on collateral review with a sentence final long before *Hall*. The Supreme Court reversed Moore's case on collateral review as contrary to *Hall. Id.* at 1049 (concluding that the Texas court's "conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*"). Additionally, *Moore* cited yet another case where the Supreme Court applied *Hall* to an *Atkins* claim on collateral review. *Id*. at 1049 (noting that in *Brumfield v. Cain,* 576 U.S. 305, 316 (2015), the Court "rel[ied] on *Hall* to find unreasonable a state court's conclusion that a score of 75 precluded an intellectual-disability finding."). Even the four

dissenters in *Moore* took no issue with applying *Hall* retroactively to Mr. Moore's case. *Id.* at 1057 (Roberts, C.J., dissenting).

For retroactivity purposes, there is no difference between this case and *Hall*, *Moore*, and *Brumfield* – they are all cases with convictions that were final well before *Hall*. The *Hall* rule must apply to Mr. Walls too. *See Collins v. Youngblood*, 497 U.S. 37, 40–41 (1990) ("[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.").

As it already has in Mr. Walls' case, this Court should hold that *Hall* applies to him and all other individuals regardless of the date of their conviction and sentence. The Court should do so not only based on Florida retroactivity law, but also as a matter of the federal retroactivity floor set by *Teague* and *Montgomery*. *See Montgomery*, 577 U.S. at 204-05 (holding substantive protections must be given retroactive effect in state collateral review).[7]

[7] Alternatively, this Court may find that *Hall* did not announce a sufficiently "new" rule at all. If *Atkins* itself dictated *Hall*'s clarification of the substantive scope of who is deemed ID, then, under *Teague*, this independently makes *Hall* applicable on state collateral review. *See Yates v. Aiken*, 484 U.S. 211, 217 (1988). Mr. Walls alternatively asserts that the substantive holding of *Hall* was not "new" for *Teague*

b. Even if *Hall* is not retroactive to all defendants, the 2017 mandate requires applying *Hall* to Mr. Walls.

Even if it concludes that *Hall* is not retroactively applicable to all Florida defendants on collateral review, this Court's 2017 mandate requires applying the principles announced in both *Hall* and *Walls* to Mr. Walls himself. Denying Mr. Walls relief on non-retroactivity grounds would violate finality-of-judgment principles. And, this Court's determination that *Hall* is retroactive to Mr. Walls is the law of the case. *See*, *e.g.*, *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997). The circuit court agreed with this interpretation, before *Nixon*, in denying the State's summary denial motion. R. 3784-89. This Court's decision in *Nixon*, even if it were not wrongly decided, cannot be used to undermine the Court's final 2017 mandate or as an exception to the law-of-the-case doctrine.

i. The finality-of-judgment principle requires merits review based on the evidentiary-hearing record.

In *State v. Okafor*, this Court explained that finality principles govern whether a prior mandate of this Court must be honored:

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purposes. *Accord Smith v. Sharp*, 935 F.3d 1064, 1084 (10th Cir. 2019) (finding that *Hall* did not break sufficiently "new" ground from what *Atkins* held, and thus must be retroactively applied).

> These principles are of no help to the State, because the issue presented by the State's petition does not turn on the law of the case doctrine. Subject to its exceptions, that doctrine locks in an appellate court's decisions on "questions of law" for later phases of the same case. Here the State's petition does not present the question whether this Court or the trial court should adhere to an earlier appellate decision on a question of law. More specifically, the State's petition does not ask us to decide whether *Poole*, rather than *Hurst,* should govern Okafor's resentencing *going forward*. Rather, the petition asks us to revisit and undo a final judgment. The exceptions to the law of the case doctrine do not speak to that issue.

306 So. 3d 930, 934 (Fla. 2020) (emphasis in original, footnotes omitted). To illustrate, the Court examined *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997), where a trial court – on remand – *would* need to make a subsequent ruling on a question of substantive law that was impacted by intervening precedent. *Id*. at 395. In *Owen*, due to intervening authority from the Supreme Court, this Court allowed the trial court to disregard now-overruled precedent (that was previously the law of the case) when ruling on any future evidentiary issue on remand. *Id*. In other words, this Court allowed the trial court to apply current substantive law at a new proceeding. However, the Court ruled that the remand order itself – which granted Mr. Owen the right to conduct that new proceeding – could not be revisited, even though it contradicted the same intervening precedent. *Id*. The law of the

case exception did *not* apply to the remand order because it was "a final decision that is no longer subject to rehearing." *Okafor*, 306 So. 3d at 935 (quoting *Owen*, 696 So. 2d at 720).

Under *Okafor*'s reading of *Owen* (and of the law of the case exception from *Strazzulla v. Hendrick*, 177 So. 2d 1 (Fla. 1965)), Mr. Walls' case is straightforward. The "overall finality" of his case is immaterial to whether the 2017 mandate applies. The non-final nature of the relief granted by the mandate – a chance to present all of the evidence of ID in support of Mr. Walls' claim and have it considered by the Florida courts using the correct constitutional standard – is not subject to reconsideration based on *Phillips* or *Nixon*, any more than the non-final relief granted in the first *Okafor* judgment. What matters in this case is the finality of this Court's judgment mandating that the circuit court conduct an evidentiary hearing and consider all of the evidence of Mr. Walls' ID under the correct standards. The finality-of-judgment principles that controlled the outcome in *Okafor* likewise control this case and require this Court to follow its mandate despite the later *Phillips* and *Nixon* decisions.

It is immaterial that the *Okafor* mandate ordered a new sentencing hearing while the *Walls* mandate ordered a new evidentiary hearing. Both mandates were final judgments in which this Court transferred jurisdiction to the circuit court, regardless of the "overall finality" of the litigation. *Cf.* State's Pet. for Writ of Certiorari, *Florida v. Walls*, No. 16-1518, 2017 WL 2665654 (May 10, 2017) at *2, *12 (asserting that this Court's "remand[] … to the trial court for a second evidentiary hearing on the intellectual disability claim" was a final judgment necessary for certiorari jurisdiction under 28 U.S.C. § 1257), *cert. denied* 138 S. Ct. 165 (2017). The *Okafor* opinion in no way turns on the fact that a sentence was vacated. Instead, the opinion centered on the fact that the time to withdraw the mandate had long since passed, as is the case here.[8]

[8] This Court's recent decision in *Thompson v. State*, No. SC20-1847, 2022 WL 969126 (Fla. Mar. 31, 2022)), is both incorrect and distinguishable. First, it is not final until rehearing is denied. Second, unlike Mr. Walls, Mr. Thompson did not have a merits ruling below for this Court to review. This Court should review the circuit court's merits ruling rather than simply dismissing it on retroactivity grounds. Finally, and importantly, this Court's *Thompson* holding ascribes a meaning to *Okafor* that has never before been articulated – not in *Okafor* and not in *Nixon* – that the distinguishing factor between *Okafor* and *Nixon* is that the sentence was vacated in *Okafor*. As explained herein, that distinction has no bearing on the application of the principles of finality or the law of the case doctrine.

Specifically, this Court determined that it lacks the authority to "recall [its] mandate and then render a different judgment." *Id.* at 933. This Court looked to § 43.44, Fla. Stat. to conclude that it had no authority to do so more than 120 days after the mandate issued.

Further, the legal standards for determining ID have not changed since the 2017 mandate. The standards announced in *Hall* are still the law and have been upheld by the Supreme Court in *Brumfield* and *Moore*. This Court cannot curtail the minimum constitutional standards that apply to these proceedings as announced by the Supreme Court.[9] Nor has it done so. The standards articulated in *Hall* and its progeny have also been applied by this Court. *See*, *e.g.*, *Oats v. State*, 181 So. 3d 457 (Fla. 2015).

The basis for the mandate in Mr. Walls' case is that he did not receive a constitutionally sound evidentiary hearing regarding his intellectual disability claim. *Walls*, 213 So. 3d at 347 (explaining Mr. Walls "did not receive the type of holistic review to which he is now

[9] *See* Article I, Section 17 of the Florida Constitution (commonly referred to as the Conformity Clause, this section holds that state courts must construe a defendant's rights pursuant to the Eighth Amendment "in conformity with decisions of the United States Supreme Court.").

entitled" and "Walls' prior hearing was conducted under standards he could not meet."). Mr. Walls is entitled to a constitutionally sound review by this Court of the evidence presented in support of his claim of intellectual disability.

Refusing to honor the 2017 mandate that determined *Hall* is retroactive to Mr. Walls would impose an even more severe consequence on him than the State's argument rejected in *Okafor* and *Jackson*. In those cases, the State argued that there was no constitutional violation at all based on the Court's intervening precedent in *Poole*. Here, *Phillips* does not change the substantive constitutional standard for ID as announced in *Hall* and does not change the fact that Mr. Walls suffered a constitutional violation at his first ID evidentiary hearing. It would make little sense to allow defendants like Okafor and Jackson to have new sentencing hearings in the circuit court, even though the substantive law at those hearings would be nearly identical to the substantive law at their original sentencings, but decline to review on the merits the evidence presented by Mr. Walls at his new evidentiary hearing now that the constitutional ID standard is substantively different.

ii. The law of the case requires merits review based on the evidentiary-hearing record.

If this Court looks to the law of the case rather than finality-of-judgment principles, the mandate determining that *Hall* is retroactive to Mr. Walls must still be followed. The law of the case history on this issue is as follows: On May 26, 2015, Mr. Walls filed a successive motion for postconviction relief requesting an evidentiary hearing to determine his intellectual disability as a bar to execution pursuant to *Hall*. The circuit court summarily denied that motion. On October 20, 2016, this Court reversed and instructed the circuit court to conduct a new evidentiary hearing. *Walls v. State*, 213 So. 3d 340 (Fla. 2016). On January 25, 2017, this Court issued its mandate commanding compliance with the October 20, 2016, opinion. The mandate was final and could not be withdrawn after May 25, 2017 – 120 days after the mandate issued. Fla. R. App. Pro. 9.340(a) ("The court may direct the clerk to recall the mandate, but not more than 120 days after its issuance"); Fla. R. Jud. Admin. 2.205 (b)(5) (same); *In re Amend. to the Fla. R. of Jud. Admin. and the Fla. R. of App. Pro.*, 125 So. 3d 743 (Fla. 2013) (same); and Fla. Stat. § 43.44 ("A mandate may not be recalled more than 120 days after it has been issued.").

Phillips, *Nixon*, and *Thompson* could not retroactively invalidate this Court's mandate. Although *Phillips* receded from the holding in *Walls*, this Court could only withdraw its mandate in Mr. Walls' case by specifically addressing his case – and then only within 120 days of the issuance of the mandate. Therefore, the law of the case remains that Mr. Walls is entitled to a full presentation and merits review by the highest Court of the evidence supporting his ID claim as a bar to execution under the current understanding of the Eighth Amendment to the United States Constitution.

It is well-settled in Florida that "all questions of law which have been decided by the highest appellate court become the law of the case which, except in extraordinary circumstances, must be followed in subsequent proceedings, both in the lower and the appellate courts." *Brunner Enterprises, Inc. v. Dep't of Rev.*, 452 So. 2d 550, 552 (Fla. 1984). In *Strazzulla*, this Court explained that even erroneous rulings in the case "will *seldom* be reconsidered or reversed[.]" 177 So. 2d at 3 (emphasis in original) (quoting *McGregor v. Provident Trust Co. of Philadelphia*, 162 So. 323 (Fla. 1935)). A change in the law of the case is only appropriate where strict

adherence to the rule would result in "manifest injustice." *Brunner*, 452 So. 2d at 552-53 (quoting *Strazulla*, 177 So. 2d at 4).

Permitting a capital defendant to demonstrate his ID based on constitutionally and scientifically appropriate considerations cannot be manifest injustice.[10] On the contrary, *depriving* a defendant of the chance to make that showing, despite a prior mandate permitting it, would be a manifest injustice under the Eighth and Fourteenth Amendments and corresponding provisions of the Florida Constitution. *See Walls*, 213 So. 3d at 348 (Pariente, J., concurring) ("Because Walls' eligibility or ineligibility for execution must be determined in accordance with the correct United States Supreme Court jurisprudence, this case is a prime example of preventing a

[10] The *Strazzulla* court was contending with a very different type of case: a civil jury instruction in a tort case. *Cf. State v. Jackson*, 306 So. 3d 936, 945 (Fla. 2020) (noting that regardless of how badly a prior decision misinterpreted the law, "we reject the State's attempt to equate [a capital case] with local ordinance and legislative acts."). Capital cases are properly afforded a heightened standard of reliability as compared to civil and other criminal matters. "More than fundamental fairness and a clear example manifest injustice, the risk of executing a person who is not constitutionally able to be executed trumps any other considerations that this Court looks to when determining if a subsequent decision of the [] Supreme Court should be applied." *Walls*, 213 So. 3d at 348 (Pariente, J., concurring).

manifest injustice if we did not apply *Hall* to Walls."); *Thompson v. State*, 208 So. 3d 49, 50 (Fla. 2016) (same as to Thompson).

The Supreme Court continues to bar execution of the intellectually disabled, *e.g., Jones,* 141 S. Ct. at 1315, so to enforce the mandate in this case is not comparable to enforcing an unlawful or unconstitutional order. The State is still required to show "a lack of intellectual disability … before an offender can be sentenced to death." *Id.* Because there can be no material harm or manifest injustice resulting from this Court reviewing the merits of the circuit court's order, this Court must review the merits of Mr. Walls' claim.

c. Even if *Hall* is otherwise non-retroactive, denying Mr. Walls' claim on non-retroactivity grounds in the current posture violates the Due Process Clause of the Fourteenth Amendment, among other provisions.

If this Court affirms the denial of relief on *Hall* non-retroactivity grounds, having previously guaranteed a *Hall*-compliant ruling, it would violate Mr. Walls' right to due process, particularly given his reasonable and detrimental reliance on this Court's 2017 mandate.

When *Walls* became final in 2017 – following the corrected opinion, mandate, and denial of the State's certiorari petition – Mr. Walls accrued an irrevocable right to have his *Atkins* claim decided

at a new hearing and governed by *Hall*. Because the State was out of legal options to undo that guarantee, Mr. Walls on remand focused on making a robust case as to all relevant factual and legal disputes. Counsel focused on gathering public records, litigating the constitutionality of a non-jury determination of his ID and the clear and convincing standard of proof, retaining five new expert witnesses for review of thousands of pages of records, participating in depositions, and coordinating travel arrangements, only to be upended by the chaotic start of the COVID-19 pandemic. Counsel did not have a reasonable belief this Court may renege its *Hall* guarantee.

Mr. Walls acted in reasonable reliance on his vested *Hall* rights due to the combination of (1) *stare decisis* generally, and (2) decades of Florida law on finality of individual appellate judgments.[11] But by mid-2020, this firewall of vested rights began to fail. The first assurance – *stare decisis* principles – buckled when this Court abruptly overruled *Hall* retroactivity in an unforeseeable 180-degree about-face. *See Phillips,* 299 So. 3d at 1024. The State did not ask

[11] *See supra* 20-29 (arguing that Florida law as to finality-of-judgment and the law of the case requires following the *Walls* mandate).

this Court to overrule the *Walls* retroactivity holding. Nor did this Court seek supplemental briefing (or otherwise give notice to other litigants) before *sua sponte* issuing a pathbreaking opinion that brought back the unconstitutional *Cherry* bar for many defendants on collateral review. The second assurance – the law on finality of individual appellate judgments – although briefly prevailing below,[12] ultimately failed on the basis of *Nixon*, which took back a similar mandate in light of *Phillips* despite the holdings in *Jackson* and *Okafor*.

If this Court now agrees to take away the rights vested to Mr. Walls in 2017 – rights any litigant in his position would have reasonably and detrimentally relied upon – that ruling would violate the Due Process Clause of the Fourteenth Amendment, which ensures fundamental fairness in litigation, including in state postconviction proceedings. *See Dist. Attorney's Office v. Osborne*,

[12] Before the 2021 hearing, the circuit court found that *Phillips* "does not affect the mandate for this Court to hold the evidentiary hearing. Indeed, because well over 120 days passed between the time the mandate issued in *Walls* and the time the *Phillips* decision was rendered, the mandate for this Court to hold an evidentiary hearing on the intellectual disability claim remains undisturbed. *See State v. Okafor*, 306 So. 3d 930, 933 (Fla. 2020)." R. 3787.

557 U.S. 52, 69 (2009); *Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985) (if a state chooses to provide post-conviction review "it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause").

The Supreme Court has repeatedly held that a litigant's procedural due process rights are violated when a state court unexpectedly decides a key issue contrary to a party's detrimentally relied-upon expectations. In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the Supreme Court held that a new judicial construction of state law exposing a defendant to previously unavailable liability violates the Due Process Clause. *Id.* at 362. The Court later described *Bouie* as akin to a "limitation[] on ex post facto judicial decision making" which is "inherent in the notion of due process." *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001). Thus, where a court decision overruling its precedent is "'unexpected and indefensible'" it will "offend[] the due process principle of fair warning articulated in *Bouie* and its progeny." *Id.* at 466. Under *Bouie*, this Court's application of its *sua sponte* overruling in *Phillips* alone (without considering that Mr. Walls also has a final mandate as to his claim) would deprive him of the due process of law.

The fair-notice case of *Lankford v. Idaho,* 500 U.S. 110 (1991), even more clearly shows how, due to the "unique circumstances," of Mr. Walls' case, a decision reneging on the guarantee of a *Hall*-compliant *Atkins* ruling would violate due process. In *Lankford*, the Supreme Court ruled that issuing a previously unforeseeable ruling (in that case, a death sentence, where it seemed that only a term-of-years or life sentence was considered) violates the due process right to fair notice if a court reasonably assures, even if implicitly, that a particular outcome was off the table, and the defense detrimentally relies on such expectation. *Id.* at 120-27.

Similar to *Lankford*, Mr. Walls reasonably relied on the 2017 mandate as guaranteeing one of two outcomes: either he wins relief or he loses after a *Hall*-compliant decision from this Court. As a result, Mr. Walls on remand focused on making the most robust merits case possible – without worrying about a third scenario where the guarantee of *Hall* would end up nullified. This scenario, in which this Court would *sua sponte* overrule its precedent and then reinterpret its finality-of-judgment law to reverse Mr. Walls' 2017 judgment, was not one he could reasonably have expected in 2017. If Mr. Walls had fair notice on remand that neither *stare decisis* nor

finality-of-appellate-judgment law would hold for even a few years, and that his otherwise-vested rights were at risk, he would have changed his litigation approach to prioritize expedience above all, so that he could prove his claim before this Court could rewrite its own law.

For these reasons, the circuit court's reliance on *Nixon* in deciding Mr. Walls' claim rendered his postconviction proceedings fundamentally unfair in violation of due process. *See Osborne*, 557 U.S. at 69 (2009) (state postconviction procedures must be fundamentally fair and comport with due process); *Evitts*, 469 U.S. at 400-01 (1985); *see also Carmell v. Texas*, 529 U.S. 513, 533 (2000) (holding "there is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life").[13]

[13] The changes from *Phillips* and its progeny also result in Mr. Walls being arbitrarily singled out, compared to similarly situated *Atkins* claimants. Thus, besides the due process violation, a non-retroactivity denial would also violate the Eighth Amendment, *see Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (pl. op. of Stewart, Powell, and Stevens, JJ.) and *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), and the Equal Protection Clause of the Fourteenth Amendment, *see Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and *Skinner v. Oklahoma ex*

II. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY DENYING MR. WALLS' CLAIM ON ITS MERITS.

The circuit court committed four foundational legal errors upon which it rested its merits conclusions. First, the court premised its principal findings on Dr. Prichard, whose opinion and testimony were tainted by the illegal subterfuge and *Massiah*[14] violations that this Court expressly forbade the State and future experts from relying on. Second, it affirmed that Florida may set a cut off for age of onset at 18, even though the "developmental period" continues well beyond that age. Third, it imposed on Mr. Walls the unconstitutional clear and convincing burden of proof. Fourth, it denied Mr. Walls the right to have a jury determine whether he is ID.

Each error was relevant to the circuit court's merits findings. The clear and convincing standard was the explicit benchmark against which the court found Mr. Walls failed to prove prongs one and three. In determining Mr. Walls did not meet the third prong, the court expressly stated that "even if" Mr. Walls had met the first prong,

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rel. Williamson, 316 U.S. 535 (1942)). *See* R. 3598-99, 3603-05 (expanding on this argument below in opposition to the State's summary denial motion).

[14] *Massiah v. U.S.*, 377 U.S. 201 (1964); *see also Malone v. State*, 390 So. 2d 338 (Fla. 1980).

"the evidence presented … [wa]s not of such weight to produce a firm belief, without hesitation, that the condition manifested prior to age 18." R. 6276. And Dr. Prichard's tainted opinion about Mr. Walls' lack of effort during testing was the key factual underpinning for the court's finding that he fell short of clear and convincing evidence. Any one of these violations requires a remand for the circuit court to make new, untainted rulings as to the elements of intellectual disability.

a. The circuit court should have stricken the State's expert due to his reliance on the illegally obtained information barred by this Court's 1991 ruling.

In 1991, this Court found the State to have committed a *Massiah* violation, among other "illegal subterfuge," by deliberately eliciting information from Mr. Walls through Vickie Beck, a corrections officer who befriend him as a ruse and urged him to waive his right to counsel when speaking with her. *Walls,* 580 So. 2d at 132-33. At trial, the State used two expert witnesses – Drs. Marshall and Perillo – who relied on Beck's information. *Id.* This Court reversed Mr. Walls' conviction and death sentence, and further ordered that "*any* further psychiatric or psychological evaluations … shall not rely *to any degree, directly or indirectly*, on the information obtained by Beck." *Id.* at 135 (emphasis added). However, at the 2021 evidentiary

hearing, Dr. Prichard, the State's sole expert, revealed that his opinion was informed by the same prohibited information. The circuit court denied Mr. Walls' motion to strike Dr. Prichard's testimony and later, in denying relief, made key factual rulings based on Dr. Prichard's tainted opinion. Because the circuit court flouted this Court's directive, which remains the law of this case, the Court should order a new merits ruling untainted by Dr. Prichard's opinion.

Dr. Prichard's *voir dire* examination showed that his opinions relied on the prohibited illegal subterfuge. Dr. Prichard admitted to not only reviewing, but *relying on* Drs. Marshall's and Perillo's 1998 reports. T. 1014. These two experts were the only ones from the 1991 trial who were given the information from Beck and were later excluded from testifying based upon having that information. *Walls*, 580 So. 2d at 132. They are also the only experts in the decades-long history of this case to suggest that Mr. Walls was malingering, other than Dr. Prichard, who relied upon their findings. Dr. Prichard cited both Drs. Perillo and Marshall in his report and discussed them at length in his deposition. Dr. Prichard's report says that his finding of "some Feigning" is "consistent with [Mr. Walls'] past," R. 4431-32; and that there is a "history of Malingering [] clearly supported in an

evaluation by Dr. Marshall in 1988. Likewise, an evaluation by Dr. Perillo in 3/88 strongly indicated Malingering from Mr. Walls." R. 4429.

The State claimed that Dr. Prichard reviewed the reports of all prior experts, T. 1027, but that is contradicted by his testimony. He did not review the report or testimony of the State's former mental retardation expert, Dr. McClaren, finding that Mr. Walls was *not* malingering, T. 1023-24, nor did he review any other expert evaluations from the trial regarding competency, all of which found that Mr. Walls was *not* malingering. T. 1021-1025. So, the only opinions that Dr. Prichard reviewed *and* relied upon were those that were expressly excluded by this Court because they improperly relied upon the illegal subterfuge obtained by Officer Beck. T. 1029.

It is clear that the idea of malingering, as first outlined by Dr. Marshall, influenced every step of Dr. Prichard's evaluation and is the crux of his opinion. He testified that Mr. Walls was malingering on his two qualifying IQ scores, T. 1043-45, and did not administer his own testing because he believed there was no point based on what he perceived to be Mr. Walls' malingering. T. 1045. He discounted Mr. Walls' presentation during their in-person evaluation, believing it

must be a malingering act, as opposed to proof of ID. T. 1045-49. Dr. Prichard even went so far as to discount the TOMM, which he administered. Mr. Walls passed the measure, indicating he was not malingering. T. 1049. But Dr. Prichard still testified that in his "clinical judgment" Mr. Walls was malingering. *See also* R. 6280-93 (rehearing motion explaining the problem with Dr. Prichard's clinical judgment). The record demonstrates that Dr. Prichard's malingering opinions cannot be separated from his conclusions on whether Mr. Walls is ID. *See also* R. 6017-6118 (written closing on this topic).

Dr. Prichard ultimately agreed that his "conclusion that Mr. Walls is not intellectually disabled is based at least in part on the fact that [the doctor] think[s] he's malingering an intellectual disability." T. 1049. In addition to admitting being influenced by the reports of Drs. Marshall and Perillo, T. 1050-51, Dr. Prichard testified that he based his malingering diagnosis on how Mr. Walls presented in their evaluation and the "unexplained" 30-point IQ drop. T. 1049. But, as discussed below, the drop in IQ was explained by the unrebutted testimony of Dr. Mark Mills, the only medical doctor and psychiatrist to testify about possible causes of Mr. Walls' IQ decline. T. 819-928.

The circuit court tied its principal factual findings on ID to Dr. Prichard's opinion. R. 6258-79. Despite orally finding that this Court's 1991 prohibition encompassed competency, insanity, and intellectual disability proceedings, T. 1047, the circuit court found that "the only exposure Dr. Prichard had to the offending information was the recitation" by Dr. Marshall "which does not appear to this Court to be of the same manner and circumstances that the transcript of the May 5th, 1988, hearing exposed…" T. 1073. In its written order dated July 15, 2021, the circuit court clarified that the information in Dr. Marshall's report "does not appear to have been derived in the same manner and circumstances, or be of the same nature, as the information concerning Officer Beck's detailed notes … which are discussed in the transcript of the May 5, 1988, competency hearing," and as such, it is "distinguishable from the detailed notes provided by Officer Beck that were condemned in *Walls*." R. 6014-15.

But this Court's 1991 prohibition does not cabin itself to the notes themselves. It includes the subterfuge that "led to information later used against Walls," and implicated his due process rights. *Walls*, 580 So. 2d at 133. Indeed, this Court found that "the

surreptitious, admittedly illegal gathering of information later transmitted to those conducing psychiatric evaluations of the accused," which "formed a substantial part of the basis for expert statements on which the trial court directly relied," were included in its holding. That is precisely what happened here. The information that Beck obtained was relayed to Dr. Marshall, whose report Dr. Prichard admitted to relying on and being influenced by.

The circuit court's order states that the "near 30-point drop in IQ scores begs the question of whether the scores obtained by [Mr. Walls] as an adult are credible representations of his IQ." R. 6268. Despite quoting Dr. Mills' and Dr. Prichard's belief that this would be "uncommon," *id.*, the Court went on to cite *only* Dr. Prichard stating "'he was not able to find any records that would suggest … a reasonable accounting for that dramatic drop over a ten-year period,'" including that he did *not* see "'…a traumatic brain injury that would account for a 29-point decline ….'" R. 6268-69. The court relied on Dr. Prichard to conclude that the IQ scores obtained as an adult were an "'intentional underperformance of Mr. Walls.'" R. 6269.

As explained more fully in Mr. Walls' rehearing motion, R. 6280-92, in adopting this conclusion, the circuit court relegated to a

footnote its incomplete recitation of the extensive history of Mr. Walls' injuries and illnesses that account for that drastic drop in IQ. This extensive history is not only documented in the records and affidavits from family and teachers who knew Mr. Walls, but was also discussed by defense expert witnesses who testified at the evidentiary hearing. The court dismissed out of hand this pervasive, documented history by stating that "Dr. Mills testified that he found no declines in Defendant's intelligence after *any strangulation episode*." *Id.* (emphasis added). The court did not discuss Dr. Mills' testimony of the high fevers, which include, but are not limited to, three bouts of viral meningitis. Dr. Mills explained in detail what meningitis is and what it does to the brain. Dr. Mills testified that the classic signs or symptoms of meningitis – including headache, sensitivity to light, malaise, exhaustion, irritability, vomiting, and stiff neck – were evident in this case on three separate instances. T. 841-42, 855.

Dr. Mills explained that viral meningitis can have long-term negative effects to the brain. T. 842; R. 5837-63. These can include cognition impairment; issues with planning, organization, inhibition (all related to the prefrontal cortex); and changes in behavior, affect, and emotion. T. 842. Cognitive impairments caused by viral

meningitis can also include impaired memory and learning, increased impulsivity disinhibition, and outbursts of rage or aggression. T. 843. Dr. Mills testified that the "literature suggests that as we get more bouts of viral meningitis the risk of … significant problem *increases over time*." T. 865 (emphasis added). The long-term negative effects of a brain injury can be worsened by subsequent brain injuries, of either the same type or a different type. T. 839. Dr. Mills testified that a series of infections can produce injuries that are subtle, complex, and can be progressive in nature. T. 838.

Despite the circuit court quoting testimony that Dr. Prichard was "'not able to find any records'" to account for an IQ drop, a complete review of Dr. Prichard's testimony reveals that he *also* testified that he reviewed the records revealing at least one diagnosed episode of viral meningitis in 1979. T. 1157. He further testified that "any brain disease," including viral meningitis, "can damage" the brain and render a person intellectually disabled. T. 1150-51. He testified that meningitis is a "brain pathogen," or a "disease process that can attack part of the brain." T. 1186. He then testified that he reviewed the records revealing at least one diagnosed episode of viral meningitis in 1979, T. 1157, and agreed that "certainly high fevers

can damage a brain, and it happens sometimes" that an "excessively high fever" causes a decrease in the child's performance. T. 1165.

The circuit court inexplicably found "that Dr. Prichard's testimony is most credible on this matter, and the most credible explanation for the decline shown in the IQ scores in 1991 and 2006 is an intentional underperformance by" Mr. Walls. R. 6268. Therefore, the court found that Mr. Walls "fails the first prong of the test for intellectual disability." *Id.*

This chain of events flies in this face of this Court's previous ruling, which is the law of this case, that it is error for the lower court to "not exclude[] Beck's information from *all* aspects of" the proceeding. *Walls*, 580 So. 2d at 134 (emphasis in original). This Court has clearly held that "the Florida Constitution prohibits [the State] from using the fruits of that subterfuge for *any purpose that will work to the detriment of the defense's case...*" *Id.* (emphasis added). This Court could not have been clearer in its holding that "any further psychiatric or psychological evaluations conducted on Walls shall not rely *to any degree, directly or indirectly*, on the information obtained by Beck." *Id.* (emphasis added). The circuit court's attempt to distinguish the information contained in Dr.

Marshall's report cannot withstand constitutional scrutiny. The court erred in not striking the State's expert and erred in finding Dr. Prichard most credible on this issue. This Court should reverse.

b. Florida's "onset before age 18" rule violates the Eighth Amendment, which requires an intellectual disability determination to be informed by clinical standards.

To prove the third prong of ID, Florida law requires that a defendant demonstrate onset of prongs 1 and 2 before the age of 18. Fla. R. Crim. P. 3.203; Fla. Stat. § 921.137. Intellectual disability is a developmental disability, T. 950, but 18 is no longer a meaningful cut-off for the developmental period, and as such is an arbitrary cut-off for prong 3 of an intellectual disability analysis.

The current clinical criteria take the neuroscientific definition of developmental period, i.e. mid 20s, into account. T. 943-44. Even the State's expert, Dr. Prichard, testified that "[i]t is a scientific fact" that brains are not developed until a person's mid-20s. T. 1164. These still-developing brains are especially at risk of being stunted due to traumatic events, compared to fully formed adult brains. *Id.*

The American Association on Intellectual and Developmental Disabilities (AAIDD) defines the developmental period as up to age 22. T. 339; AAIDD 12th ed. at 1, 13, 32-33, 117. Federal law, namely

the Developmental Disabilities Act of 2000, also defines the end of the developmental period as age 22 for developmental disabilities. T. 340; 42 U.S.C. § 15002 (8)(A). The Diagnostic and Statistical Manual, 5th ed., leaves the developmental period undefined, recognizing that it can be hard to pinpoint a specific age, but abandons the strict 18-cut-off it previously employed. T. 339. *See* Russell et al., From Intellectual Disability and the Death Penalty: Florida's Wrongs Should be Made Right, 57 No. 1 Crim. Law. ART 2, at *4 (2021).

Recently in the Supreme Court, the United States agreed that the AAIDD-12's new definition of "age of onset" was "a significant intervening factual change that affects a central predicate of the court['s] Eighth Amendment analysis." Br. of Respondent, *Coonce v. United States*, No. 19-7862 (U.S. July 21, 2021) at 12; *see also* 142 S. Ct. 25, 28 (2021) (Sotomayor, J., dissenting) (counting 41 states as eschewing a strict 18-cutoff to explain that such a cutoff is inhumane by allowing execution of individuals whose disability manifested slightly after 18). This Court should hold that Fla. R. Crim. P. 3.203 and Fla. Stat. § 921.137 are unconstitutional to the extent they require a defendant to prove his intellectual disability onset prior to age 18, rather than in "the developmental period."

c. Fla. Stat. § 921.137 (4), requiring proof by clear and convincing evidence, violates the Due Process Clause of the Fourteenth Amendment.

This Court should decide whether Florida's clear and convincing burden for proving ID claims violates the federal Constitution. This is an open question the Court has avoided because, in various prior cases, the trial court made broad findings that independently supported denying relief, even under a preponderance of the evidence standard. *See, e.g., Haliburton v. State,* 331 So. 3d 640, 652 (Fla. 2021); *Dufour v. State*, 69 So. 3d 235, 253 (Fla. 2011). But here, the circuit court made each finding only under the clear and convincing burden.

Consistent with virtually all jurisdictions to consider the question,[15] this Court should now hold the clear and convincing ID

[15] *See Pruitt v. State*, 834 N.E.2d 90, 103 (Ind. 2005) (finding a clear and convincing burden for proving *Atkins* claims unconstitutional on due process grounds); *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004) (same); *Bowling v. Commonwealth*, 163 S.W.3d 361, 382 (Ky. 2005) (same); *State v. Williams*, 831 So. 2d 835, 860 (La. 2002) (same); *Morrow v. State*, 928 So. 2d 315, 324 n.10 (Ala. Crim. App. 2004) (adopting preponderance standard on federal due process grounds); *Murphy v. State*, 54 P.3d 556, 568 n.20 (Okla. Crim. App. 2002) (similar but without relying on due process) & *id.* at 573 n.7 (Chapel, J., concurring on federal due process grounds); *Commonwealth v. Sanchez*, 36 A.3d 24, 64-70 & nn.22-23 (Pa. 2011) (adopting a preponderance of the evidence standard relying in part on federal due

burden unconstitutional as a matter of the Due Process Clause of the Fourteenth Amendment (or alternatively, the Eighth Amendment), and remand to the circuit court to apply the appropriate standard.

"The function of a standard of proof, as that concept is embodied in the Due Process Clause … is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996) (quoting *Addington v. Texas*, 441 U.S. 418, 423); *see Santosky v. Kramer*, 455 U.S. 745, 755-56 (1982) ("[T]he degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left to the judiciary to resolve.'") (quoting *Woodby v. INS*, 385 U.S. 276, 284 (1966)). In routine civil disputes, and in most federal constitutional litigation, due process requires only that the moving party bear the burden of proving its factual predicate by "[a] preponderance-of-the-evidence[, which] allows both parties to share the risk of error in roughly equal fashion." *Herman & MacLean*

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process); *but see Young v. State*, 860 S.E.2d 746 (Ga. 2021) (upholding a beyond a reasonable doubt standard of proof), cert. denied, *Young v. Georgia*, 142 S. Ct. 1206 (2022).

v. Huddleston, 459 U.S. 375, 390 (1983).[16] And if the constitutional dispute is one where the State seeks to restrict individual liberty, due process requires shifting the burden to the State and imposing – *upon the State* – the heightened standard of proof.[17] But in no circumstance has a State ever been allowed to require the defendant to prove a constitutional entitlement by a higher burden than simple preponderance. *See Medina*, 505 U.S. at 448-49 (distinguishing burden for proving incompetence to stand trial from burden for state-law insanity defense because latter is not constitutionally required).

Applying these due process risk-allocation principles, the Supreme Court unanimously held that a state may not impose a clear

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[16] *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 589 (1998) (prisoners' Eighth Amendment improper-motive retaliation claims cannot require clear and convincing proof); *Medina v. California*, 505 U.S. 437, 439 (1992) (incompetence to stand trial); *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006) (counsel's deficient performance); *McCormick v. Parker*, 821 F.3d 1240, 1246 (10th Cir. 2016) (*Brady* violations); *United States v. Lord*, 711 F.2d 887, 891 & n.3 (9th Cir. 1983) (collecting cases showing that preponderance for most constitutional claims more generally).

[17] *In re Winship*, 397 U.S. 358, 364 (1970) (due process requires the State to prove criminal guilt beyond a reasonable doubt); *Addington*, 441 U.S. at 427 (due process requires the State to bear a clear and convincing burden for involuntary civil commitments); *Santosky v. Kramer*, 455 U.S. 745, 756, 758, 769 (1982) (same, when the State seeks to terminate parental rights); *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) (same for denaturalization of a U.S. citizen).

and convincing burden for proving incompetency to be tried. *Cooper*, 517 U.S. 348. Where the substantive constitutional right is at stake, and described by an "inquiry in a simple disjunctive," the burden of proof for its factual predicate translates to "'more likely than not'." *Id.* at 357. Acknowledging that "important state interests are unquestionably at stake," *id.* at 367, the Court emphasized that "the consequences of an erroneous determination of competence are dire" for the defendant, compared to the more modest consequences for the State, *id.* at 364–65. The clear and convincing burden violated due process because "[u]nder that standard a defendant may be put to trial even though it is more likely than not that he is incompetent." *Id.* at 350; *see* Russell et al., *supra* 46, at 10.

Under this reasoning, the constitutional problem with imposing this standard on *Atkins* rights is more glaring. The consequences of an erroneous determination are far more "dire," *id.*, for the defendant facing execution than for the State, which remains able to impose other harsh punishment, including life imprisonment. *See Howell*, 151 S.W.3d at 465 (applying this reasoning to hold that Tennessee's clear and convincing burden for *Atkins* claims violated due process); *Williams*, 831 So. 2d at 860 (same, in Louisiana).

Florida Stat. § 921.137 (4), suffers from the same infirmity the Supreme Court found unanimously in *Cooper.* The problem is as glaring as a hypothetical statute purporting to require defendants to prove *Miranda, Batson*, *Strickland*, or *Brady* violations by clear and convincing evidence. A State may not overrule those constitutional rights, and it may not restrict their availability by throttling the burden of proof. *See Bailey v. Alabama*, 219 U.S. 219, 244 (1911) ("a constitutional prohibition cannot be transgressed indirectly by the creation of a [procedural rule] any more than it can be violated by direct enactment"); *cf. Crawford-El,* 523 U.S. at 585, 594 (1998) (rejecting the Third Circuit's "sweeping" policy-based rule imposing a clear and convincing burden for some elements of federal claims, including Eighth Amendment claims, in 42 U.S.C. § 1983 suits).

d. The circuit court erred in not empaneling a 12-person capital-qualified jury to unanimously render a factual finding on Mr. Walls' ID claim.

Mr. Walls has a constitutional right to a unanimous jury determination of the factual findings constitutionally necessary for the imposition of a death sentence, pursuant to *Hurst v. Florida*, 577 U.S. 92 (2016), the Sixth and Eighth Amendments to the United States Constitution, and the corresponding provisions of the Florida

Constitution. Because Mr. Walls asserted that he is factually ID – and therefore ineligible for the death penalty – he has a state and federal constitutional right to have a jury determine that fact.

The Sixth Amendment requires Florida to base a death sentence "on a jury's verdict, not a judge's factfinding." *Hurst*, 577 U.S. at 102. The right to a trial by jury applies with special force to the facts necessary to impose a sentence of death. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 602 (2002). Section 921.137, Fla. Stat., sets forth an additional element, beyond the findings set out in § 921.141,[18] which must be determined unanimously by a jury – whether or not he is ID. A defendant's ID "operates as the functional equivalent of an element of a greater offense, [and therefore] the Sixth Amendment requires that [it] be found by a jury." *Ring*, 536 U.S. at 609.

[18] Under § 921.141, Fla. Stat., before a death sentence is imposed, a jury must unanimously find: 1) whether sufficient aggravating circumstances exists; 2) whether the aggravating circumstances outweigh the mitigating circumstances; and 3) even if the jury affirmatively answers those two questions, the jury unanimously determines that death is the appropriate punishment.

In *Hurst*, the Supreme Court held that all facts that are statutorily necessary before a judge is authorized to impose a death sentence are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial. 577 U.S. at 98. It is well-established that where a defendant raises intellectual disability as a bar to execution, he is not eligible for death absent an explicit finding that he is *not* intellectually disabled. This makes a defendant's intellectual-disability status a necessary finding for the jury to convict them of capital murder, and is thus an element that must be unanimously determined by the jury.

Hurst held the Sixth Amendment requires the jury, not the judge, to be the finder of "every fact" and "each element" necessary for the imposition of the death penalty. *Id.* at 97, 99. In short, intellectual disability is a factual finding that must be determined before a death sentence can be imposed and must be unanimously determined by a jury. This Court has repeatedly identified *Atkins*/*Hall* claims as determining death eligibility. *Cardona v. State*, 185 So. 34 514, 525 (Fla. 2016) ("Cardona alleged that she suffered from an intellectual disability, which would make her ineligible for the death penalty."); *Thompson v. State*, 208 So.3d 49, 50 (Fla. 2016)

("[b]ecause Thompson's eligibility or ineligibility for execution must be determined in accordance with the correct United States Supreme Court jurisprudence, this case is a prime example of preventing a manifest injustice if we did not apply *Hall* to Thompson."); *Walls v. State*, 213 So. 3d at 348 (applying *Hall* retroactively to determine Walls' "eligibility or ineligibility for execution.").

The Supreme Court recently recognized that "lack of intellectual disability" is a factual "eligibility criterion" such that *Ring* (and *Apprendi v. New Jersey*, 530 U.S. 466 (2000)) "might require that a jury, not a judge, make such a finding." *Jones*, 141 S. Ct. at 1315-16 & n.3; *cf. Wooden v. United States*, 142 S. Ct. 1063, 1087, n.7 (2022) (Gorsuch, J. concurring) ("The Fifth and Sixth Amendments generally require the government in criminal cases to prove every fact essential to an individual's punishment to a jury beyond a reasonable doubt… And it is hard not to wonder: If a jury must find the *facts* supporting a punishment … beyond a reasonable doubt, how may judges impose a punishment without equal certainty about the *law's* application to those facts?") (citations omitted) (emphasis in original).

Mr. Walls recognizes that this Court declined to find § 921.137 unconstitutional in *Oats v. Jones*, 220 So. 3d 1127 (Fla. 2017).

However, *Oats* misidentified the determination of intellectual disability as "not a necessary finding to impose a death sentence, but is, rather, the opposite – a fact that bars death." *Id.* (internal citations omitted). As noted earlier, the Supreme Court in *Jones* last term characterized this to the contrary – the lack of intellectual disability is an eligibility criterion potentially subject to *Ring* and *Apprendi* analysis. *Jones*, 141 S. Ct. at 1315-16 & n.3. Moreover, *Oats* acknowledged that "nothing from the United States Supreme Court decisions in *Ring*, *Atkins*, *Hall*, or *Hurst v. Florida* compel a conclusion either way on the issue of whether a judge or jury must determine that a criminal defendant is intellectually disabled." 220 So. 3d at 1130. As noted above, that is no longer the case.

Alternatively, Mr. Walls asserts that *Oats* was wrongly decided because § 921.137 violates his Fifth, Sixth, Eighth and Fourteenth Amendment rights in that it precludes the admission of relevant evidence to a defense of the death penalty and thus deprives Mr. Walls of a jury factual determination of an absolute defense to the death penalty. State procedural rules that deprive a defendant of the right to present evidence that he is constitutionally entitled to present - including evidence of a defense, especially an affirmative defense -

violate due process. *Holmes v. South Carolina*, 547 U.S. 319 (2006); *Chambers v. Mississippi*, 410 U.S. 284 (1973). That is why other states provide for a jury determination of intellectual disability, including: North Carolina (N.C. Gen. Stat. § 15A-2005), Louisiana (LSA-C.Cr.P. Art. 905.5.1), Arizona (*State v. Escalante-Orozc*o, 241 Ariz. 254 (2017)), Oklahoma (Okla. Stat. Ann. Tit. 21, § 701.10b), South Carolina (*Franklin v. Maynard*, 588 S.E.2d 604,606 (S.C. 2003) and S.C. Code Ann. § 16-3-20(C)(b)(10)(2003)), and (formerly) Virginia (*Burns v. Warden*, 609 S.E.2d 608 (Va. 2005) (Virginia subsequently abolished the death penalty.).

This Court should therefore remand the case for a presentation of the evidence of Mr. Walls' ID to be determined by a 12-person, capital-qualified jury.

III. MR. WALLS PROVED HIS INTELLECTUAL DISABILITY.

a. The circuit court correctly found that Mr. Walls has significant adaptive deficits and therefore meets prong 2 of the intellectual disability consideration.

Mr. Walls presented extensive evidence of his adaptive deficits, starting at an early age and continuing even in a highly restricted prison environment. The State's expert, Dr. Prichard, did not contest that Mr. Walls has significant adaptive deficits. The circuit court

correctly found "no basis to disregard the testimony presented by the defense and the State," as to adaptive deficits, and therefore found that Mr. Walls "satisfies the second prong of the test for intellectual disability." R. 6274.

b. The circuit court erred in concluding that Mr. Walls does not have significantly subaverage general intellectual functioning.

The circuit court ruled that Mr. Walls fell short of clear and convincing evidence as to prong 1 of the of intellectual disability consideration: significantly subaverage general intellectual functioning. R. 6264. It did not dispute that Mr. Walls' two adult IQ scores, if valid, would satisfy that prong. However, it held that the evidence was short of clear and convincing evidence due to the court's doubts as to whether Mr. Walls gave "full effort" on those tests. It reasoned that Mr. Walls had average-range childhood scores and did not show a traumatic event to easily explain the major IQ decline to reconcile the new scores. The court noted that Mr. Walls presented "medical events and circumstances" (i.e., repeated meningitis bouts, drug use, and other insults) during late childhood to explain the drop in IQ, but found that it was not "evidence … of such weight that it produces a firm belief, without hesitation, that [he] has significantly

subaverage intellectual functioning." R. 6272. The court did not address how its doubts would fare under a lower burden of proof.

The court erred in several respects by reasoning backwards to surmise an invalidity (due to low effort, or malingering) of Mr. Walls' adult IQ scores. The record here shows that any notion that Mr. Walls intentionally underperformed to obtain his otherwise-qualifying adult IQ scores is refuted. Mr. Walls' adult IQ scores were valid even under the clear and convincing evidence burden.

First, the two adult scores were psychometrically identical despite being fifteen years apart, an extraordinarily unlikely coincidence without genuine effort. The measured scores of 72 and 74 required different raw scores. T. 346-48, 1203. In other words, to fake a consistent score, Mr. Walls would have had to deliberately get a higher raw score on a second, different instrument. T. 1204. Faking this would be "challenging [even] for a psychologist to replicate," in the words of Dr. Cunningham, T. 399-400, and a "near impossible" feat in the words of Dr. Hagerott, T. 535-36. The consistency alone is clear and convincing evidence that the results are legitimate.[19]

[19] The circuit court's explanation for rejecting this premise is insufficient. The court relied on Dr. Prichard's testimony that IQ

Second, Mr. Walls passed multiple unrelated measures for screening out underperformance. He passed the TOMM[20] in 2006, which was "quite consistent with good effort." T. 404. And he passed it again with Dr. Prichard eleven years later, in a "perfect performance, showing excellent effort." T. 405-06. Mr. Walls also passed malingering metrics that were used by clinicians before the TOMM. Dr. Hagerott administered the Wechsler Memory Scale, which revealed that he was not "deliberately dialing down his intelligence." T. 402-403, 529-30. He also passed the Reliable Digit Span, an embedded measure for effort used by Dr. Hagerott. T. 403. She concluded that nothing made her concerned "that adequate effort was not being given." T. 529. And Mr. Walls passed improvised objective metrics devised to screen effort with other experts, such as interpreting a clock face, a personal check, and discussing rules in sports contests, an altogether "authentic presentation." T. 411-12.

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questions get progressively harder, and a faker can recognize this to adjust his answers. This does not speak to how difficult it is for a person to fine tune a *credible* level of malingering by later replicating that precise inauthenticity on a different testing instrument.

[20] Dr. Prichard also uses the TOMM to screen for underperformance or malingering memory deficits. T. 1185; *see also* T. 106, 535, 1136.

The State pointed to no objective effort measures that Mr. Walls did not pass. The only basis for Dr. Prichard's opinion that the 1991 and 2006 IQ scores were faked was his own "clinical judgment" (or unscientific speculation) of how Mr. Walls, in his 2017 evaluation, was difficult and oppositional with him, T. 1210-18, and talked like a child and appeared unserious, T. 1053-54, 1176-78. This was wholly subjective judgment in 2017, used to make a speculative inference as to 1991 and 2006, not an objective effort metric.[21]

Dr. Prichard's 2017 interview was not recorded, despite Mr. Walls' request, R. 386, making it impossible for future experts or courts to review. However, Dr. Crown sat in on that evaluation and flatly disagreed with Dr. Prichard's description of Mr. Walls. T. 1230-31 (describing that Mr. Walls was present, agreeable, cooperative, and "not at all" oppositional to Dr. Prichard or inconsistent with ID). The State never challenged Dr. Crown's first-hand observations of the same interview during cross-examination. R. 1234.

[21] As noted earlier, the self-evident explanation for Dr. Prichard's insistence on malingering is his reliance on old reports that were premised on illegally obtained communications, whose use in future evaluations and proceedings were expressly forbidden by this Court. *See supra* at 36-45.

It is difficult to imagine a better record for this Court to reject a suggestion of malingering. The circuit court's finding that Mr. Walls' IQ scores are short of the clear and convincing hurdle due to its opinion that he gave low effort should be reversed.

Once the "full effort" concerns are refuted, it is clear that Mr. Walls has significantly subaverage intellectual functioning. The circuit court never disputed that, assuming good effort, Mr. Walls' scores qualify for the first prong. And this is for good reason, since even without adjusting for the obsolete scaling norms and tail-end sampling errors, Mr. Walls' IQ scores fall well within the range of ID.[22] Importantly, though, adjusting for those errors would mean that even if *Hall* is again deemed inapplicable to this case due to *Phillips* and its progeny, Mr. Walls still qualifies for intellectual disability relief because the record now shows that, even under the pre-*Hall* cutoff, his true IQ scores were at 70 or below.[23]

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[22] Given the page limits and the fact that this issue was not disputed by the circuit court, Mr. Walls will not further discuss norm obsolescence and sampling error adjustments. This issue was thoroughly discussed in closing arguments below. *See* R. 6017-6118.

[23] The pre-*Hall* rule that automatically barred SEM consideration did *not* bar correcting inaccurately inflated IQ scores. *See State v. Herring*, 76 So. 3d 891, 893 n.4 (Fla. 2011); *cf. Snelgrove v. State*,

Finally, the circuit court relied on stereotypes and perceived strengths as circumstantial evidence of low effort. The court insinuated that Mr. Walls' use of precise numbers (noting weights of "312" and "296" pounds) and use of big words ("modification diet"), plus the "fluid nature" of his communication with his family, is "not consistent with intellectual disability." R. 6271. But abilities of this variety are not inconsistent with intellectual disability. The court's reliance on this kind of speculation fails even under this Court's qualified endorsement, in a related context, of the role a person's strengths might have in a diagnosis. *See Wright v. State*, 256 So. 3d 766, 776 & n.8 (Fla. 2018) (examining scope of limited permissible use of a person's strengths in an ID inquiry on the second prong).[24]

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107 So. 3d 242, 247 (Fla. 2012) (noting, without disapproval, defendant's Flynn effect evidence).

[24] Additionally, Mr. Walls' neuropsychological testing, although different from IQ testing, has clinical relevance to assessing intellectual functioning and must be considered in the totality of the evidence on that issue. T. 389-94. A neuropsychological battery administered in 1984 (when Mr. Walls was 16) revealed that his intelligence was consistent with onset of intellectual disability. T. 512-14, 389-94; R. 4803-07. A later battery administered in 1991 revealed consistent results too. T 595-97, 514-15; R. 5121-25.

c. The circuit court erred in concluding that Mr. Walls did not demonstrate that his intellectual disability manifested during the developmental period.

The circuit court ruled that "the evidence presented by the defense is not of such weight to produce a firm belief, without hesitation, that the condition manifested prior to age 18. Therefore, Defendant fails to show by clear and convincing evidence that he satisfies the third prong of the test for intellectual disability." R. 6276.

However, the record contains compelling evidence that Mr. Walls was suffering significant deficits in both intellectual and adaptive functioning before his eighteenth birthday, and certainly before his mid-twenties, which is scientifically considered the end of the developmental period. Indeed, one of the two qualifying IQ scores was obtained in Mr. Walls' early twenties.

It is true that Mr. Walls had measured IQ scores during his childhood in the average range, but those scores do not tell the whole story. The circuit court erred in relying on the IQ scores alone without giving proper weight to the evidence of repeated neurological injuries that caused Mr. Walls' intellectual functioning to drop in his late teenage years. As explained fully in Mr. Walls' closing argument below, R. 6017-6118, and in his rehearing motion, R. 6280-93, there

is ample testing and other indicia – particularly the comprehensive neuropsychological battery by Dr. Chandler at age 16 – that indicate manifest intellectual functioning deficits by at least age 16.

Since Mr. Walls satisfies prong one by virtue of IQ scores measured at ages 23 and 39 (plus neuropsychological batteries), that alone should satisfy developmental onset as well. There is no indication of anything *after* the developmental period, but *before* his age 23 qualifying IQ score, which could show a drop in intellectual functioning as an adult. T. 1156.

Mr. Walls was arrested for these crimes and has been incarcerated since he was 19. The State provided thousands of pages of prison records to their expert. Nothing in those records indicates any causation for Mr. Walls' cognitive decline post-incarceration. T. 1043, 1156. There is no reason believe that Mr. Walls became intellectually disabled at some point *after* the age of 18. T. 1156. It is important that Mr. Walls' cognitive decline is already the law of this case. The trial court specifically found after the 1992 trial that Mr. Walls had proven the non-statutory mitigator that "[t]he defendant had apparent brain dysfunction" and a separate non-statutory mitigator that his "intelligence quotient decreased from the time he

was school age to the present. His I.Q. scores dropped from 'Average' level to 'Low Normal.'[25] … the defendant is functioning intellectually at about the age of 12 or 13." ROA SC-60-80,364 at 1170.

Although Mr. Walls has no obligation – legally or clinically – to demonstrate the etiology of his intellectual disability, he presented the circuit court with medical records and testimony that reveal repeated, serious neurological insults to the brain, from early childhood into his teen years. This provides explanatory context for his deteriorating conceptual and intellectual functioning, and his general predisposition to various deficits, due to the organic insults. Such insults are risk factors that caused or contributed to Mr. Walls' intellectual disability and serve as evidence that his significant drop in IQ, which the trial court already found in 1992 to have occurred, was before age 18. The best way to determine a potential etiology is a comprehensive review of the defendant's history, such as was done by Mr. Walls' experts. T. 878.

[25] The 1992 Court is referring to the full-scale IQ score of 72 that Mr. Walls obtained at age 23, which is "mildly intellectually disabled," not "low normal" under today's clinical and legal understanding of ID.

This Court has held that a defendant does not have to be *diagnosed* with intellectual disability as a child in order to prove prong 3. *Oats*, 181 So. 3d at 464-65. "This prong simply requires that a defendant demonstrate that his 'intellectual deficiencies manifested while he was in the 'developmental stage'—that is, before he reached adulthood.'" *Id*. at 468, (citing *Brumfield*, 135 S. Ct at 2282). However, the circuit court erroneously discounted all evidence that Mr. Walls' ID manifested prior to 18. It is hard to imagine what more could have convinced the circuit court on this prong other than an actual diagnosis pre-18, considering the overwhelming evidence of repeated neurological injuries presented at the evidentiary hearing.

It would take more pages than Mr. Walls has for this brief to detail each and every indicator of brain damage that he sustained during childhood and adolescence that resulted in his intellectual disability in his teen years. These details are explained in the testimony of Dr. Mills, T. 819-928, in Mr. Walls' closing argument, R. 6017-6118, and rehearing motion, R. 6280-93, which Mr. Walls incorporates by reference here. Below is an abbreviated discussion.

Dr. Ouaou testified that the neuro-developmental period, extending into mid-twenties, is the period under which the central

nervous system (the brain) undergoes a series of changes and develops into maturity. T. 940, 943. Many external factors, known as "risk factors," can cause abnormal neurodevelopment. Risk factors that cause a brain to develop abnormally can cause an intellectual disability if they occur during the developmental period. T. 950.

Mr. Walls experienced a series of these risk factors that affected his brain in a progressive and compounding manner. T. 876, 838-39, 845. Most of these various insults to Mr. Walls' brain that could cause intellectual disability took effect after Mr. Walls' IQ testing as a child but before he turned 18.

Dr. Mills recounted the historical and medical evidence and the likely impact on Mr. Walls' brain. At age 2, Mr. Walls was hospitalized for a week and a half after he "sustained high fever of 105 or 106." T. 848; R. 5117. At age 9, a school counselor noted that Mr. Walls was given the Bender test of visual and motor functioning and made seven errors, where on average children his age make no more than 2.5. T. 851; R. 4615. In addition to making nearly three times as many errors as his peers, Mr. Walls rotated two of the images, demonstrating that his visual and motor impairments were "pretty significant," which Dr. Mills testified indicated a "cognitive deficit." T.

852-53. Mr. Walls repeatedly presented to the Air Force medical clinic with severe headaches and possible migraines as a child. R. 1256-58; T. 853-54.

At age 12, Mr. Walls presented to the hospital with another high fever, of 102 degrees, that began two days prior. T. 854; R. 1323, 1325. Mr. Walls had butted heads with another child during a volleyball game and was experiencing all of the classic signs of meningitis. T. 854-56; R. 1323, 1325. He was diagnosed with and treated for viral meningitis. T. 861; R. 1323, 1325. Dr. Mills testified that the infection may have been more severe than meningitis; it could have been encephalitis, as well, meaning the infection spread to the brain tissue itself. T. 855-56. He was hospitalized for five days. T. 856-57. Dr. Mills testified that this was a "moderate to severe" episode of viral meningitis. T. 861.

The following year, at age 13, Mr. Walls presented again to the hospital with a high fever of 103 and the classic signs of meningitis. T. 861; R. 1295. Mr. Walls underwent a blood test that revealed a "very elevated white blood count." T. 862; R. 1295. Dr. Mills testified that "there is no doubt [Mr. Walls] has some kind of infection," and "that he [wa]s probably suffering from meningitis." T. 862.

In 1983, at age 15,[26] Mr. Walls again presented to the hospital and described feeling "exactly like previous viral meningitis." T. 863; R. 1303. Dr. Mills testified that this was "almost certain[ly] another episode of viral meningitis." T. 863. Dr. Mills also testified that this third bout of meningitis "could have been an independent cause for a diminution in [Mr. Walls'] cognitive abilities." T. 908. It also could have been a tipping point in the cumulative effect these previous injuries were having on Mr. Walls' brain. T. 909.

Dr. Mills testified that the correct test to determine functional impairment in intelligence would be a "comprehensive neuro-psychological battery." T. 836. In determining whether meningitis has affected a brain's functioning, a functional assessment of the brain over time would be conducted. T. 837. Mr. Walls had just such a test at age 16 in 1984 when he underwent a neuropsychological battery of tests that resulted in a diagnosis of cerebral dysfunction.[27] T. 909. These cognitive deficits noted in this testing are indicative of intellectual disability. T. 909.

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[26] This event was after Mr. Walls' IQ was tested at age 14, but before his neuropsychological battery was performed at age 16, revealing cerebral dysfunction.

[27] After this result, Mr. Walls' IQ was not tested again before age 18.

Dr. Mills explained that viral meningitis can have long-term negative effects on the brain. T. 842; R. 5837-63. These include cognition impairment; issues with planning, organization, inhibition (all related to the prefrontal cortex); and changes in behavior, affect, and emotion. T. 842. Cognitive impairments caused by viral meningitis can also include impaired memory and learning, increased impulsivity disinhibition, and outbursts of rage or aggression. T. 843. Dr. Mills testified that a series of infections can produce injuries that are subtle, complex, and can be progressive. T. 838. Dr. Mills testified that *even if* the later two infections were not meningitis, they were still medical events that could have caused or contributed to Mr. Walls' brain damage, which resulted in him becoming intellectually disabled. T. 911.

Dr. Mills explained that mild to moderate cumulative injuries take time to see, and the further away from the event one is, the clearer the negative effects can be. T. 839, 845-46. In Mr. Walls' case, the IQ testing conducted in 1982 was simply not far enough away in time from the brain injuries to reveal the full scope of the impairments that his brain would endure, and it pre-dated the final

meningitis infection in 1983. By 2006, when Mr. Walls' IQ was next measured, the effects of his brain injuries were on full display.

The circuit court overlooked the unrebutted testimony that long-term negative effects of a brain injury can be worsened by subsequent brain injuries, of either the same type or a different type. T. 839. The undisputed record shows that Mr. Walls experienced a "series of slower, smaller insults" to the brain. T. 876. In finding no "competent, substantial evidence[28] of significant brain trauma to support the near 30-point drop in IQ," R. 6269, the court overlooked evidence and testimony of exactly that, rendering its factual findings unreasonable in light of the record. This Court should reverse and find that Mr. Walls has met his burden as to prong 3, age of onset.

[28] "[C]ompetent, substantial evidence" is an appellate standard of review and does not accurately describe Mr. Walls' burden of proof before the circuit court.

IV. CONCLUSION

The Court should reverse and either enter a judgment in favor of Mr. Walls, finding that he is intellectually disabled and ineligible for execution, or remand to the circuit court for reconsideration of the claim unburdened by the numerous constitutional errors described in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading has been furnished by electronic service to all counsel of record on this 21st day of April, 2022.

/s/ Kara R. Ottervanger
Kara R. Ottervanger

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