**IN THE SUPREME COURT OF FLORIDA**

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

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**FRANK ATHEN WALLS,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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

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# REPLY BRIEF

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## PRELIMINARY STATEMENT

Citation to the record will be the same as in Mr. Walls' Initial Brief (cited as "IB at [#]"). Mr. Walls relies on the arguments made therein and uses this Reply Brief to respond only to the most concerning factual and legal misrepresentations made by the State in its Amended Answer Brief, cited as "AAB at [#]."

## ARGUMENT

### I. *Hall v. Florida* must govern this appeal.

In its Amended Answer Brief, the State argues that "decisional law in effect at the time an appeal is decided govern the appeal," for the proposition that this Court must apply *Phillips*[1] to deny Mr. Walls relief on retroactivity grounds. AAB at 16-17. But what the State's argument misses is that the decisional law in effect is *Hall*,[2] which as United State Supreme Court precedent trumps opinions by this Court on all federal constitutional issues. Under a plain reading of *Hall*, the substantive new rule announced therein is retroactive.

[1] *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020)
[2] *Hall v. Florida*, 572 U.S. 701 (2014)

The State cites this Court's decisions in *Thompson*,[3] *Nixon*,[4] *Pooler*,[5] *Cave*,[6] and *Lawrence*[7] as examples of other retroactivity-based denials of *Hall* claims. However, *Pooler*, *Cave*, and *Lawrence* are distinguishable because they did not involve mandates from this Court commanding the trial court to conduct an intellectual disability hearing. As for *Nixon* and *Thompson*, Mr. Walls explained in his Initial Brief why those decisions are wrong as to retroactivity, in light of the Supreme Court's rulings in *Hall*, *Brumfield*,[8] *Moore*,[9] and *Montgomery*,[10] and should not govern here, especially in light of: this Court's 2017 mandate, which is the law of this case; the principles of finality; Due Process under the Fourteenth Amendment; and this Court's precedent in *Okafor v. State*, 306 So. 3d 390 (2020).

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[3] *Thompson v. State*, __ So. 3d__, 2022 WL 969126 (Fla. Mar. 31, 2022)
[4] *Nixon v. State*, 327 So. 3d 780 (Fla. 2021), *cert. denied*, No. 21-1173 (June 21, 2022)
[5] *Pooler v. State*, 302 So. 3d 744 (Fla. 2020)
[6] *Cave v. State*, 299 So. 3d 352 (Fla. 2020)
[7] *Lawrence v. State*, 296 So. 3d 892 (Fla. 2020)
[8] *Brumfield v. Cain*, 576 U.S. 305 (2015)
[9] *Moore v. Texas*, 137 S. Ct. 1039 (2017)
[10] *Montgomery v. Louisiana*, 577 U.S. 190 (2016)

The State counters Mr. Walls' argument that *Phillips* violates procedural due process under *Lankford*[11] and *Bouie*,[12] reasoning that "*Phillips* can hardly be said to be 'unexpected'" because other courts, "including the Eleventh Circuit" have agreed with *Phillips*. AAB at 25. This is incorrect. This Court decided *Walls*[13] less than four years before *Phillips*, and the issue of retroactivity was never raised in *Phillips*. So, this Court's decision to *sua sponte* overturn itself was completely unexpected, as the rule in *Hall* had not changed or been undermined by any Supreme Court precedent.

On the contrary, *Walls* finds support in Supreme Court cases such as *Moore*, *Brumfield*, and *Montgomery*. Importantly, each of these cases supporting the original retroactivity holding in *Walls* were issued after *In re Henry*,[14] which the State cites for the proposition that the Eleventh Circuit "agrees with *Phillips*." The State fails to mention that the Eleventh Circuit has recognized that new Supreme Court precedent undermined *In re Henry*'s retroactivity reasoning. *See Smith v. Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330, 1339 n.5

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[11] *Lankford v. Idaho*, 500 U.S. 110 (1991)
[12] *Bouie v. City of Columbia*, 378 U.S. 347 (1964)
[13] *Walls v. State*, 213 So. 3d 340 (Fla. 2016)
[14] *In re Henry*, 757 F.3d 1151 (11th Cir. 2014)

(11th Cir. 2019) (declining to apply *In re Henry* because intervening Supreme Court authority in *Montgomery* "undermined the reasoning" of that decision); *In re Bowles*, 935 F.3d 1210, 1220 n.3 (11th Cir. 2019) (Carnes, C.J.) (quoting *Smith* to explain that "*Montgomery* [] 'undermined the reasoning of … *In re Henry*.'"). And, *Walls* was decided after *Montgomery*, so there was no reason to expect that this Court would recede from its reasoning in *Walls* after the Supreme Court endorsed that line of reasoning in a similar case.

The State argues that *Phillips* "is certainly not 'indefensible'" in the wake of *Edwards*[15] because the Supreme Court "narrowed the federal test for retroactivity" under *Teague*.[16] But *Edwards* only abrogated the second retroactivity exception: watershed rules of criminal procedure. Mr. Walls does not argue that *Hall* is a criminal procedure rule at all; rather he argues, as this Court found in *Walls*, that *Hall* is retroactive as a new substantive rule, which falls under the first, and still intact, avenue for *Teague* retroactivity. As Mr. Walls noted, claims based on new substantive rules affecting permissible sentences are fully cognizable – even under the most restrictive

[15] *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021)
[16] *Teague v. Lane*, 489 U.S. 288 (1989)

reading in the context of federal habeas corpus. *See* IB at 12, n.3 (quoting *Edwards*, 141 S. Ct. at 1571 (Gorsuch, J., concurring)).

The State's reliance on a footnote in *Jones*[17] for the proposition that *Montgomery* will not be followed, AAB at 26, must fail. Dicta from a footnote does not overturn precedent; *Montgomery* remains good law. And the State mischaracterizes *Jones*. Contrary to the State's suggestion, that footnote stresses: "To be clear, however, our decision today does not disturb *Montgomery*'s holding that *Miller* applies retroactively on collateral review." *Jones*, 141 S. Ct. at 1317 n.4. As explained in the initial brief – and never challenged by the State – the same retroactivity analysis under which *Montgomery* deemed *Miller* a substantive retroactive rule compels the finding that *Hall* is also a substantive retroactive rule. *See also Smith*, 924 F.3d at 1339 n.5.

The State concedes that "[o]nly substantive criminal rules will now be retroactive." AAB at 25. Because *Hall* announces a new substantive rule, it is retroactive to Mr. Walls in his collateral appeals. The State never even attempts to defend the retroactivity reasoning in *Phillips*, which the Initial Brief challenges. This Court

[17] *Jones v. Mississippi*, 141 S. Ct. 1307 (2021)

should reverse the circuit court's retroactivity ruling.

## II. The trial court's reliance on Dr. Prichard's illegally tainted opinion is reversible error.

The circuit court erred in permitting Dr. Prichard's testimony because his opinion as to Mr. Walls' effort on two IQ tests, and his overall clinical evaluation, was directly influenced by prohibited evidence, in clear violation of this Court's 1991 opinion. *See Walls v. State*, 580 So. 2d 131, 132-33 (Fla. 1991).

Notably, the State never defends the circuit court's basis for allowing Dr. Prichard to testify. There is no dispute that Dr. Prichard (admittedly) relied on the expert report that contains reference to, and is influenced by, the illegally obtained statements this Court prohibited from any further use. Indeed, Dr. Prichard cited to the illegal evidence in his written report. The State does not dispute that this reliance is contrary to this Court's 1991 directive.

The State bases its defense of the lower court's decision on the remarkable proposition that this Court's 1991 mandate is inapplicable outside the jury-trial context because constitutional rights do not apply at any stage beyond the trial. AAB at 28-30. The State asks this Court to overlook the circuit court's erroneous finding

that Dr. Prichard's opinion was not tainted by the "illegal subterfuge," *Walls*, 580 So. 2d at 132-33, because at this stage of the proceeding, the State insists that relying on subterfuge is permissible. The State claims it "is doubtful that *Massiah*[18] violations, in general, or this Court's prohibition, in particular, extends beyond the trial" to postconviction. AAB at 28.

This reading is plainly incorrect. First, on its face, this Court's 1991 ruling is not limited to trial proceedings. It condemned reliance on the unconstitutional subterfuge "for <u>any purpose</u> that will work to the detriment of the defense's case, <u>including</u> determination of competence or insanity." *Walls,* 580 So. 2d at 134 (emphasis added). The ruling specifically notes examples of mental health litigation, including collateral proceedings for incompetency or sanity. Below, the circuit court agreed with Mr. Walls and correctly read the 1991 mandate as instructing that subterfuge "should not be and may not be relied upon to any extent in this case," including the hearing below. T. 594. The State does not defend the circuit court's only disagreement: finding that Dr. Prichard was not sufficiently tainted.

[18] *Massiah v. U.S.*, 377 U.S. 201 (1964)

Moreover, even if this Court's "prohibition, in particular" did not plainly state that the subterfuge could not be used "to any degree, directly, or indirectly" going forward, it defies logic to suggest that a constitutional right would only prohibit the government from using illegally obtained information against a defendant at trial-level mental health evaluations, but not in later constitutional mental health litigation like an *Atkins*[19] claim. The State's reliance, AAB at 29, on cases allowing voluntary statements obtained in violation of *Miranda*[20] to be used for impeachment is irrelevant because those cases rely on the fact that *Miranda* is not itself a constitutional right. But where a statement is involuntary, it may not be used ever, even for impeachment. *See Mincey v. Arizona*, 437 U.S. 385, 397 (1978) (holding that, unlike *Miranda* non-compliant statements, the State may never introduce involuntary statements, even to impeach). The State's cases are further unpersuasive, as Mr. Walls' statements obtained by the officer in violation of *Massiah* were not being used to impeach him; they were being relied upon to determine the veracity of his presentation during a clinical evaluation and effort on IQ tests.

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[19] *Atkins v. Virginia*, 536 U.S. 304 (2002)
[20] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Even if constitutional rights sometimes take on different import in postconviction proceedings, this proceeding is different because it concerns the litigation of a federal constitutional prohibition against executing the intellectually disabled, which did not exist until *Atkins* in 2002. Unquestionably, this Court's mandate against use of subterfuge in mental health evaluations in future proceedings would apply to constitutional litigation as to intellectual disability as much as it would for sanity or competence.

Separately, the State suggests that the circuit court's error is effectively harmless because Dr. Prichard's tainted testimony would only impact the first prong, not the third prong. AAB at 30. This is incorrect. Dr. Prichard testified that he agreed that the brain injuries Mr. Walls suffered could lower his intelligence, but concluded that he did not think that was the case given his view that Mr. Walls faked the 29-point drop in IQ. *See, e.g.*, AAB at 57 ("Dr. Prichard thought such a large drop in IQ scores was evidence of malingering, *despite Walls having passed his test of memory malingering (TOMM).*") (emphasis added). Had Dr. Prichard not based his entire view of the case on his tainted finding of malingering, his testimony might have been different. If Mr. Walls has a valid *Hall*-compliant score (prong 1)

in his early twenties, then the only remaining question is whether the IQ score dropped during the developmental period or after (prong 3). The entire basis for doubting prong 3 would be eliminated if Mr. Walls' IQ score at age 23 were recognized as valid.

Moreover, though both sides recognize that neuropsychological testing is not a replacement for an IQ score, an unbiased psychologist would still consider such testing relevant to intellectual functioning, especially when there is unrebutted medical evidence of severe brain traumas both before and after the childhood IQ scores were measured. This is particularly so given that there was a period of several years during which Mr. Walls was a child and his IQ was not measured. The unrebutted evidence at the hearing shows that Mr. Walls suffered at least one brain injury in that period alone, in addition to the cumulative effect of the prior injuries on his still-developing brain. T. 863; R. 1303. But, Dr. Prichard was predisposed to think that Mr. Walls was malingering due to illegally obtained information, and the use of that information pervades his opinion. The State elicited testimony from Dr. Prichard that not only did he believe the low IQ scores were faked, but therefore there was no lowering of the IQ at all. This led him to discount the medical evidence

that supports that Mr. Walls' IQ was lowered before the age of 18. The *Massiah* violation, and Dr. Prichard's suggestion of malingering, implicates both prongs 1 and 3.

The State cites the dissent from the 2016 *Walls* opinion for the proposition that Mr. Walls could not establish prong 3 regardless of the *Massiah* violation. AAB at 29. What this ignores is that the entire point of the remand was to let Mr. Walls meaningfully present evidence of all three prongs, in context of the current scientific understanding of intellectual disability, with a full view of the complicated interplay of factors, rather than having his presentation curtailed by this Court's now-rejected reading of the statute. *Walls*, 213 So.3d at 347; *id.* at 348 (Pariente, J., concurring) ("Walls has yet to have 'a fair opportunity to show that the Constitution prohibits [his] execution.'") (quoting *Hall*, 572 U.S. at 724). The State knows this, as it cites to this Court's mandate that the circuit court conduct a new evidentiary hearing and engage in "holistic review." AAB at 21. Thus, contrary to the State's characterization of the *Walls* dissent, the onset prong cannot be resolved separate from the intellectual functioning prong and the total picture of all evidence of Mr. Walls' condition.

## III. The State mischaracterizes Mr. Walls' argument as to the unconstitutionality of the standard of proof.

The State argues that there is "no occasion for resorting to the rules of statutory interpretation" with respect to the statute governing the burden of proof for an intellectual disability determination. AAB at 35. But Mr. Walls is not asking the Court to interpret § 921.137 (4), Fla. Stat. He agrees the statutory burden is clear and convincing evidence. Instead, Mr. Walls challenges the constitutionality of the statute, which places an impermissibly high burden on the defendant to prove that he is constitutionally ineligible to be executed. The trial court agreed that the proper standard is preponderance of the evidence, but felt constrained by the statute and this Court's precedent. R. 1036-39. This Court should deem the statute unconstitutional. Fla. Const. art. V § 3(b); *see, e.g.*, *Martinez v. Scanlan*, 582 So. 3d 1167 (Fla. 1991).

In defending the constitutionality of § 921.137(4), the State insists that *Leland*[21] should control instead of *Cooper*.[22] In *Leland*, the Supreme Court held that "beyond a reasonable doubt" was an

[21] *Leland v. Oregon*, 343 U.S. 790 (1952)
[22] *Cooper v. Oklahoma*, 517 U.S. 348 (1996)

acceptable standard for a state-law insanity defense. *Cooper* held that a lower standard, clear and convincing evidence, was unacceptable for proving incompetence to be tried. But *Leland* is not controlling because in that case the Supreme Court addressed a state-created insanity defense that was not based in the Constitution. *See generally Bowling v. Com.*, 163 S.W.3d 361, 381-82 & n.35 (Ky. 2005) (following *Cooper* over *Leland* and collecting cases showing that "[a]ll courts that have considered the issue in the absence of a statute have held that the defendant is required to prove [intellectual disability] by a preponderance of the evidence.")[23]

The State notes that "[t]hree other death penalty states have statutes similar to Florida's." AAB at 42. This is inaccurate. First, the State's reliance on the Colorado statute fails to acknowledge that

[23] The State's argument about multiple opportunities to litigate intellectual disability (as a mitigator, and as a *per se* bar) is irrelevant and unresponsive. Nothing in *Cooper* indicates that the basis for rejecting the clear and convincing standard was that there was only the one opportunity to present the evidence. Having a second opportunity to demonstrate intellectual disability with a proper, constitutional standard does not remedy the fact that the first opportunity to do so was done under an unconstitutional standard. The best evidence of the fact that this is no remedy at all is that Mr. Walls proved two mitigators at trial related to his low intelligence, but that did not prevent him from being sentenced to death. The State concedes as much in its brief. AAB at 40.

Colorado abolished the death penalty in 2020.[24] The State next cites to Arizona and North Carolina, which have the dual opportunity to prove intellectual disability that the State incorrectly claims Florida has. Although these states require a clear and convincing showing pretrial, they also allow the question of intellectual disability to be presented *de novo* to the jury, not as a mitigator, but as a bar to the imposition of the death penalty, using the constitutional preponderance of the evidence standard. *See* N.C. Gen. Stat. § 15A-2005(f); *State v. Escalante-Orozco*, 386 P.3d 798, 830 (Ariz. 2017) (interpreting the Arizona statute as directing courts to "instruct[] the jury that it must impose a life sentence if it [finds] by a preponderance of the evidence that [the defendant] is intellectually disabled.") (abrogated on other grounds). Florida provides no opportunity to prove an *Atkins* claim by preponderance.[25]

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[24] *See* Colo. S.B. 20-100. The three men on Colorado's death row had their sentences commuted. *See* Colorado Sun, "Governor signs bill abolishing Colorado's death penalty, commutes sentences of state's 3 death row inmates" (Mar. 23, 2020) *available at* https://coloradosun.com/2020/03/23/colorado-death-penalty-repeal/, last visited June 3, 2022.

[25] Mr. Walls requested, but was denied, both a jury determination of his intellectual disability, R. 514, and the use of the preponderance standard, R. 948.

The State also misrepresents the fractured precedent from the Georgia Supreme Court and the Eleventh Circuit on this issue. The Eleventh Circuit has not actually had the opportunity to review a due process challenge to heightened *Atkins* standards of proof unconstrained by AEDPA deference. *See, e.g., Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (ruling that the Georgia law was not "contrary to clearly establish law"); *but see id.* at 1361-63 (Tjoflat, J., concurring) (explaining a cognizable due process violation with a heightened standard of proof for a constitutional claim, where the argument is presented properly and not constrained by AEDPA). And the Georgia Supreme Court recently issued a fractured decision with no majority opinion on whether the clear and convincing standard comports with Supreme Court precedent. *Young v. State*, 860 S.E.2d 746, (Ga. 2021) (four-justice plurality; one justice voting to affirm without opinion; three justices concurring in result, despite recognizing that the law was inconsistent with *Hall* and *Moore*; one justice dissenting).

Regardless, the mere fact that two states have a heightened standard of proof does not show that such a standard is constitutional. If analyzed under the Eighth Amendment as evolving

standards of decency, those jurisdictions are extreme outliers. Of the 27 remaining jurisdictions that have the death penalty, only one – Florida – has a clear and convincing standard with no mechanism for the defendant to be assured a life sentence if he proves his intellectual disability by preponderance of the evidence, and only one state – Georgia – has a higher standard than Florida. *See Roper v. Simmons*, 543 U.S. 551, 572 (2005) (examining "objective indicia of society's standards, as expressed in legislative enactments and state practice"). The evolving standards of decency weigh against using the clear and convincing burden of proof. Florida is an outlier, just as it was an outlier when it utilized an IQ of 70 as a strict cut-off for determination of intellectual disability. And under the due process analysis, the fact of existing state laws is irrelevant. As *Cooper* confirms, when a constitutional right is at issue, a state has no ability to throttle its availability indirectly by imposing a heightened standard of proof.

## IV. The trial court and the State inaccurately describe the evidence in support of prong 3 – age of onset.

Citing portions of the circuit court's order, the State repeats that "there was no evidence showing any of the incidents of health issues

'affected' his intellectual functioning," referring to the 101 IQ score Mr. Walls obtained at age 14. But the circuit court and the State failed to take into consideration a significant wealth of evidence explaining the IQ decline at the evidentiary hearing. The State and the circuit court ignored the totality of Dr. Mills' unrebutted testimony that explains how brain injuries can take years to manifest, and that the cumulative effect of these injuries can be catastrophic. T. 839, 845-46, 909. By looking only to scores at age 12 and 14, the State improperly disregards what happened in the four years after Mr. Walls' IQ was last measured as a child, but before he turned 18. T. 512-14, 389-94; R. 4803-07. There is overwhelming evidence of brain injuries that caused a decline, which were measured by objective tests before Mr. Walls had any incentive to fake a low score. These are corroborated on later tests before his second trial, when being intellectually disabled was still not a bar to his death sentence. There was an additional, third bout of meningitis after Mr. Walls' IQ test at age 14, which could have been the sole reason for the drop demonstrated at age 16 on neuropsychological testing, or could have been the proverbial straw that broke the camel's back with respect to his intellectual capacity. His intellectual

functioning declined after his childhood scores, and there is no evidence of any new insults after Mr. Walls' incarceration at age 19 that could support a drop in IQ during his pretrial incarceration.

As this Court held, and the State does not dispute, Mr. Walls does not need a diagnosis or a qualifying IQ score prior to age 18. *Oats v. State*, 181 So. 3d 457, 464-65 (Fla. 2015). Thus, to rely so heavily on childhood scores alone without considering the holistic picture of the various pathologies and risk factors at play denies Mr. Walls a fair opportunity to demonstrate that his IQ dropped significantly during adolescence. There is no competent and substantial evidence to support the trial court's finding that there was "no evidence" to support Mr. Walls' claim that his IQ dropped. On the contrary, there is ample evidence showing that it did.

Moreover, as this Court and the United States Supreme Court have held, a determination of intellectual disability must be made considering all three prongs in a holistic manner. This means that "if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of the other prongs," and this Court "must consider all three prongs in determining an intellectual disability, as opposed to relying on just

one factor as dispositive." *Oats*, 181 So. 3d at 467-68; *see also Walls*, 213 So. 3d at 346; *see also Hall*, 572 U.S. at 723 ("It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment.") (citing DSM-5 at 37). !

## V. It is inappropriate to average IQ scores when making an intellectual disability diagnosis.

The State attacks the validity of Mr. Walls' IQ scores through novel and original research on appeal, never presented at the hearing, positing that this Court should simply average Mr. Walls' IQ scores. But it is inappropriate to average IQ scores, and it is even more inappropriate for this argument to be considered for the first time on appeal. The experts at the hearing, and other authoritative sources, do not support averaging IQ scores when determining intellectual disability. Neither the DSM-5, upon which the Florida statute is based, nor the AAIDD-12[26] recommend it. Further, neither § 921.137 Fla. Stat. nor Fla. R. Crim. P. 3.203 authorize a court to average IQ scores when making this determination.

[26] The State cites the AAIDD-11 user guide in its brief, AAB at 66, but the most recent edition of the authoritative text is AAIDD-12, and that is what the experts at the evidentiary hearing used during their testimony. Neither edition supports averaging IQ scores.

The State wildly misrepresents *Hall* for its averaging proposition by quoting that the "analysis of multiple IQ scores jointly is a complicated endeavor." AAB at 65 (quoting *Hall*, 572 U.S. at 714). Other than that quote, the State relies on two dissenting opinions, neither of which call for "averaging" multiple scores, but instead comment on the common occurrence of there being multiple IQ scores to contend with. AAB at 64-65. The State claims that the *Hall* majority references a "composite" score, AAB at 65, but that term does not ever appear in the *Hall* decision, let alone affect its holding. For this, the State cites to a portion of a scholarly article cited by the Supreme Court, AAB at 65-66, but the Supreme Court did not cite or endorse that portion of the article. Moreover, the article does not support the State's theory that it is appropriate to average IQ scores. For example, on the very page the State cites, the article reads: "Intuitively, it might seem reasonable to simply average all [of the] IQ results and say that the IQ is [that number]. However, this is not quite right … Another way to think about this issue is to recognize that the mean score cannot be interpreted as an IQ score …" Schneider, *Principles of Assessment of Aptitude and Achievement*, The Oxford Handbook of Child Psychology Assessment, 286, 290.

While the State spends several pages of argument explaining why it thinks mathematicians would use an average, it refuses to acknowledge that *Hall* specifically directed courts to be "informed by the work of medical experts in determining intellectual disability." 572 U.S. at 710 (emphasis supplied). Indeed, *Hall* admonished Florida for evaluating intellectual disability in a manner that was "in direct opposition to the views of those who design, administer, and interpret the IQ test." *Id.* at 724. Psychologists and medical experts, not mathematicians, "design, administer, and interpret the IQ test."

Most notably, this line of argument is outside the scope of the record, and was not raised in any pre-hearing motions or used in any way at the evidentiary hearing.[27] The correct method for interpreting IQ results is a question to be answered by expert witnesses with specialized knowledge, not by lawyers or judges engaging in original scientific research. And the State did not ask any of Mr. Walls' experts, or even its own expert, about the propriety of averaging IQ

[27] The State incorrectly asserts, without citation, that Mr. Walls "insisted on adjusting the averages the State employed by the SEM", AAB at 68, n.7, but the State never used averages at the hearing. Instead, Mr. Walls presented expert testimony that the measured IQ scores, not averages, should be adjusted for the SEM, as well as other peer-reviewed and widely accepted psychometric tools.

scores. If the State asked its own expert, he likely would have disagreed with the theory of "averaging" now being advanced.[28] When the State previously attempted to smuggle a similar "averaging" hypothesis into its written closing argument, the circuit court agreed that it would be inappropriate to consider scientific argument outside of the record not presented through expert testimony.[29] This Court should not in any way rely on this information.

The State melds the averaging theory into its argument that this case is "easily resolvable" based on prong 3 alone. AAB at 68. But the State again focuses on the wrong issue. By repeatedly relying only on

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[28] Dr. Prichard testified in another case that it is not appropriate to average multiple IQ scores to come up with a mean "because [], essentially, when you do that [] you're invalidating every score…" which is "not the appropriate interpretation of it." *See Exhibit 1*, Testimony of Dr. Prichard in *State v. Nixon*, Leon County Case No. 1984-CF-2324, ROA Vol. I, at 189-91 (October 23, 2006). This Court may take judicial notice of this previous opinion. *See* Fla. Stat. § 90.202(6).

[29] Mr. Walls moved to strike the State's argument below. R. 6188-94. The trial court, citing concerns about the appearance of "unfair circumstances for the defense" ruled that any arguments made by the State "that are not connected to the law and the testimony from the hearing or other record evidence in this case, … will be disregarded." R. 6217-18. And its order made no reference to the improper extraneous arguments the State now makes. R. 6258-77. The State should not now be allowed to sandbag the defense on issues that go to the heart of the case.

the IQ scores that were obtained before Mr. Walls turned 14, the State ignores the evidence of Mr. Walls' IQ dropping shortly thereafter. Therefore, neither the measured childhood IQ scores themselves, nor the improper "average" of these scores is determinative. The State dismisses this evidence as "speculative testimony … regarding a possible but undocumented reoccurrence of viral meningitis" that "does not begin to rebut" these earlier scores. AAB at 69. But the unrebutted testimony is neither speculative nor undocumented. Mr. Walls presented hundreds of pages of medical records and psychological records that demonstrate repeated viral infections which – regardless of the underlying pathology – were sufficient to cause serious brain damage. T. 841-42, 855. These records also documented that in the years between Mr. Walls' 14th and 18th birthdays, his neurocognitive functioning was in steep decline and he was diagnosed with cerebral dysfunction as an adolescent. T. 909. The State cites the dissent in *Walls* for its proposition that only the childhood scores matter, but the majority of this Court disagreed, and remanded for a consideration of all evidence, including medical and psychological records and testimony, previously unexplored,

that may speak to the onset of Mr. Walls' intellectual disability after these measured scores but prior to his 18th birthday.

The State also gravely misrepresents the holding of *Moore v. Texas*, claiming that "[i]t is only when the average is 'at or below 70,' that the other two prongs matter." AAB at 71, n.8 (quoting *Moore*, 137 S. Ct. at 1049). What *Moore* actually holds is that a measured IQ score, in conjunction with the ± SEM, "yields a range" of scores, and if "the lower end of [that] score range falls at or below 70," then the Court must move on to consider other prongs. *Moore*, 137 S. Ct. at 1049 (addressing a ± 5 SEM range for a single, measured IQ score, not an average of many scores); *accord Hall*, 572 U.S. at 713 (the SEM "means that an individual's score is best understood as a range of scores on either side of the recorded score … within which one may say an individual's true IQ score lies.") (emphasis supplied). The *Moore* opinion, like *Hall*, does not support the averaging of IQ scores. Accordingly, the State's conclusions that "Walls must show an average IQ as an adult that is under 71" and that "[c]apital defendants who fall in the borderline range are not protected by *Atkins*" AAB at 71-72, n.8, are nonsensical and should be rejected.

## VI. Conclusion

For these reasons, and those raised in Mr. Walls' Initial Brief,[30] this 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.

Respectfully submitted,

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[30] With respect to the State's footnote 9, objecting to "incorporation by reference," Mr. Walls responds that Fla. R. App. P. 9.210 (b)(5) does not prohibit him from directing this Court to additional authorities with specific citations for arguments that are fully made in the Initial Brief. The rule cited by the State contemplates "argument with regard to each issue, with citation to appropriate authorities …." Mr. Walls fully briefed these issues in his Initial Brief. This Court has the record in order to have a full understanding of the arguments and facts presented below. There is nothing improper about incorporating additional support for arguments by reference to the record. It is only "incorporation by reference or reference to issues from a brief in a separate and distinct case" that is improper. *Wright v. State*, 19 So. 3d 277, 297, n.19 (Fla. 2009).

## 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 22nd day of June, 2022.

**/s/ Kara R. Ottervanger**
Kara R. Ottervanger

## CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Initial Brief of Appellant has been reproduced in a 14-point Bookman Old Style type, a font that is not proportionately spaced.

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